FILE COPY

DEC 2

CHARLES ELM

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1929.

J. DU PRATT WHITE, FRANKLIN W. HOPKINS, EDWARD J. PARTRIDGE, GEORGE W. PERKINS, JR., FREDERICK C. SUTRO, GEORGE T. SMITH, WILLIAM CHILDS, W. AVERELL HARRIMAN, CHARLES W. BAKER and FREDERICK H. OSBORN, constituting the Board of Commissioners of the Palisades Interstate Park, HAMILTON WARD, as Attorney General of the State of New York, and ALEXANDER MACDONALD, as Commissioner of the Conservation Department of the State of New York,

Appellants,

against

SPARKILL REALTY CORPORATION and STANDARD TRAP ROCK CORPORATION,

Appellees.

No. 360. 33

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEES

JACKSON A. DYKMAN,
Counsel for Appellees.

WILLIAM N. DYKMAN,
on the Brief.

PRINTED IN THE UNITED STATES BY B. H. TYRRELL, INC., 110 GREENWICH STREET, NEW YORK.

TABLE OF CONTENTS.

	PAGE
Statement	1
Parties	2
The Commissioners of Palisades Interstate Park	3
Facts	4
Value of Property	8
The Power to Take	11
Outline of Argument	13
ARGUMENT	14
POINTS	
I. No power exists to pledge the credit of New York	14
II. A taking of property in eminent domain is a violation of due process unless there is provided a sure, efficient and convenient remedy by which the owner can coerce payment of just compensation	20
III. No enforceable means of obtaining compensation has been provided	40
IV. Being without the means of enforcing payment of compensation appellees are injured and may raise the questions presented	66
V. All facts essential to the presentation of the federal question appear by allegations of the bill of complaint	68
VI. Public bodies will be enjoined from illegal acts done under color of right which cause irreparable injury to the property rights of individuals	74
VII. The interlocutory decree grants proper relief	86
Conclusion	88
The interlocutory decree should be in all respects affirmed	90

TABLE OF CASES.

	PAGE
Adirondack Ry. *v.* New York State, 176 U. S. 335..	25
American Bank *v.* Goss, 204 App. Div. 759	52
Attorney General *v.* Old Colony Railroad, 160 Mass. 62, 90	24
Backus *v.* Fort St. Union Depot Co., 169 U. S. 557	24
Banner Milling Co. *v.* State, 240 N. Y. 533.....	68
Baron *v.* Korn, 127 N. Y. 224, 228.....	79
Bix Six Development Co. *v.* Mitchell, 138 Fed. 279	84
Bloomquist *v.* Farson, 222 N. Y. 375.....	79
Board of Excise *v.* Curley, 9 Abb. N. C. 100; 69 N. Y. 608	53
Bohmer *v.* Haffen, 35 App. Div. 381, 386; 161 N. Y. 390, 405	48
Bragg *v.* Weaver, 251 U. S. 57, 62.....	28, 34
Carling *v.* Purcell, 3 Misc. 55, 56.....	51
Cavanaugh *v.* Looney, 248 U. S. 453	87
County of Albany *v.* Hooker, 204 N. Y. 1, 19.....	72
Crozier *v.* Krupp, 224 U. S. 290	28
Flagg *v.* Moses, 132 Misc. 494.....	85
Flood *v.* Van Wormser, 147 N. Y. 284.....	78
Gilchrist *v.* Interborough Co., 279 U. S. 159, 207..	66
Goltra *v.* Weeks, 271 U. S. 536, 545.....	76
Great Falls Mfg. Co. *v.* Attorney General, 124 U. S. 581	37
Half Moon Bridge Co. *v.* Canal Board, 91 Misc. 600	43, 58
Harris *v.* White, 81 N. Y. 532.....	53
Hays *v.* Port of Seattle, 251 U. S. 233.....	33
Joslin *v.* Providence, 262 U. S. 668, 677.....28, 34, 68	

PAGE

Kahlen *v.* State of New York, 223 N. Y. 383..... 46

Knapp *v.* The City of Brooklyn, 97 N. Y. 520..... 51

Litchfield *v.* Bond, 186 N. Y. 6[illegible]..... 22, 78
Love *v.* Atchison, T. & S. F. Ry. Co., 185 Fed. 321 83

Matter of Alter'g etc. Main St., Sing Sing, 98 N. Y. 454 51
Matter of Appl'n Mayor, etc. of City of N. Y., 99 N. Y. 569 25
Matter of Bronson, 150 N. Y. 1 47
Matter of William and Anthony Streets, 19 Wend. 678 68
Merritt & Chapman Co. *v.* U. S., 274 U. S. 611.... 68
Minnesota *v.* Hitchcock, 185 U. S. 373..... 30
Mitchell *v.* United States, 267 U. S. 341 69
Mt. Vernon Cotton Co. *v.* Alabama Power Co., 240 U. S. 30, 33 28
Mundy *v.* Excise Commissioners of New York, 9 Abb. N. C. 117 54

Newell *v.* The People, 7 N. Y. 9, 106..... 16
New Orleans *v.* Benjamin, 153 U. S. 411, 430..... 66
N. Y. C. R. R. Co. *v.* Maloney, 234 N. Y. 208 69

Op. Atty. Gen. (1916) 123 43
Orleans County Quarry Co. *v.* State, 172 App. Div. 863 69
Osborn *v.* U. S. Bank, 9 Wheat. 738 .....67, 80, 86

Pauchogue Land Corporation *vs.* Long Island State Park Commission, 243 N. Y. 15..... 19

Pauchogue Land Corporation *vs.* Long Island State Park Commission, 248 N. Y. 635; c. d. 278 U. S. 657 ..... 34, 85

PAGE

People ex rel. Garvey *v.* Prendergast, 148 App. Div. 129 53
People ex rel. Hopkins *v.* B'd Suprs. Kings Co., 52 N. Y. 556.....18, 55, 64
People *v.* Johnson Co., 219 App. Div. 285; 245 N. Y. 627; 275 U. S. 571 71
People of New York *v.* Canal Board of N. Y., 55 N. Y. 390 ..... 18, 76
Percy Summer Club *v.* Astle, 145 Fed. 53; 163 Fed. 1 ..... 83, 84
Philadelphia Co. *v.* Stimson, 223 U. S. 605..... 76
Pokegama *v.* Klamuth, 86 Fed. 528; 96 Fed. 34.... 81
Railroad *v.* Mississippi, 102 U. S. 96..... 67
Rockaway Pacific Corp. *v.* Stotesbury, 255 Fed. 345 ..... 38, 39
Rogers *v.* Bradshaw, 20 Johns 735 90
Sage *v.* The City of Brooklyn, 89 N. Y. 189..... 20
Shoemaker *v.* United States, 147 U. S. 282..... 38
Slaughter *v.* Mallet Land & Cattle Co., 141 Fed. 282, 288 82
Smith *v.* Reeves, 178 U. S. 436, 444 78
Sweet *v.* Rechel, 159 U. S. 380..... 23
Twist *v.* Prairie Oil Co., 274 U. S. 684, 691..... 84
United States Freehold Land and Emigration Co. *v.* Gallegas, 89 Fed. 769, 773..... 84
Western Un. Tel. Co. *v.* Andrews, 216 U. S. 165.. 84
West Point Iron Co. *v.* Reymert, 45 N. Y. 703.... 79
Williams *v.* Parker, 188 U. S. 491 26

Books

Lewis, Eminent [illegible] (2d ed.) 1253 ..... 8, 68
Pomeroy, Equity [illegible] § 98 82
High, Injunctions, § 806 82

Constitutions and Statutes

PAGE

Condemnation Law
Section 17 24
Section 24 ..... 24, 89

Conservation Law
Section 9 3
Section 50 88
Section 59 ..... 42, 45, 64, 65, 75
Section 662 ..... 64, 65, 75
Section 759 ..... 24, 45
Section 761 45

Constitution of New York
Section 16, Article III 48
Section 21, Article III 14, 19, 39, 44, 54, 55, 61, 62
Section 2, Article V 3, 4
Section 4, Article VII 14, 43, 56, 58, 59, 64
Section 21, Article VII 17

Executive Law
Section 68 3

General Construction Law
Section 80 ..... 46, 47

Judicial Code
Section 266 87

Laws of 1817, Chapter 262 89
Laws of 1851, Chapter 485 16
Laws of 1857, Chapter 628 53
Laws of 1859, Chapter 439 61
Laws of 1868, Chapter 631 20
Laws of 1872, Chapter 700 ..... 18, 55
Laws of 1872, Chapter 740 18

PAGE

Laws of 1874, Chapter 327..... 33
Laws of 1875, Chapter 431..... 51
Laws of 1880, Chapter 568..... 51
Laws of 1892, Chapter 340..... 48
Laws of 1897, Chapter 220..... 25
Laws of 1900, Chapter 170
3, 4, 11, 12, 24, 45, 46, 51, 53, 60, 61
Laws of 1902, Chapter 473..... 22
Laws of 1909, Chapter 27..... 47
Laws of 1913, Chapter 801..... 58
Laws of 1924, Chapter 112..... 35
Laws of 1924, Chapter 602
42, 44, 45, 46, 47, 51, 53, 57, 58, 60, 61, 63, 64
Laws of 1926, Chapter 16
12, 13, 43, 44, 46, 47, 51, 53, 54, 55, 57, 61, 62, 63, 71, 74, 76
Laws of 1928, Chapter 75.....44, 54, 57, 61, 62, 63, 88
Laws of 1928, Chapter 242
3, 4, 5, 12, 45, 46, 49, 50, 53, 63, 72

Revised Statutes of N. Y.
Art. IV, Title I, Chapter 16, Part I..... 51

Sess. Laws 1913, p. 195..... 33

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1929.

J. DU PRATT WHITE, FRANKLIN W. HOPKINS, EDWARD J. PARTRIDGE, GEORGE W. PERKINS, JR., FREDERICK C. SUTRO, GEORGE T. SMITH, WILLIAM CHILDS, W. AVERELL HARRIMAN, CHARLES W. BAKER and FREDERICK H. OSBORN, constituting the Board of Commissioners of the Palisades Interstate Park, HAMILTON WARD, as Attorney General of the State of New York, and ALEXANDER MACDONALD, as Commissioner of the Conservation Department of the State of New York, Appellants, *against* SPARKILL REALTY CORPORATION and STANDARD TRAP ROCK CORPORATION, Appellees.	No. 366.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEES.

Statement.

This is a suit to restrain appellants, Commissioners of the Palisades Interstate Park, from appropriation of

plaintiff-appellees' trap rock quarry and crushing plant at Piermont, New York (R., 10).

The question presented is whether state officers may appropriate real property for park purposes by notice under a statute which provides and is accompanied by no means of compensation to the owner because, in the absence of funds appropriated for the purpose, the state constitution forbids payment of any judgment out of any funds in the state treasury.

The Conservation Law of New York has not been held void.

No statute of New York pledges or authorizes a pledge of the entire or any portion of the credit of the state to pay for property taken in eminent domain.

There being no means by which appellees can enforce payment of compensation the District Court has enjoined appropriation of the land by appellant Commissioners.

Parties.

Plaintiff, Sparkill Realty Corporation, owns the real property in question at Piermont, New York, on the western bank of the Hudson River, containing an extensive deposit of trap rock easily available for quarry purposes, (Complaint, par. Seventh, R., 4; Shaw, R., 36; Soper, R., 47; Gucker, R., 48; Lane, R., 50).

Plaintiff, Standard Trap Rock Corporation, leased this property in 1927 for twenty years with a privilege of renewal for a like term at a minimum rental of $35,000 per year. The lease was made for quarry purposes. Plaintiff lessee has constructed a stone-crushing plant on the property and stripped a portion of the quarry at a cost of more than one million ($1,000,000) dollars, Com-

plaint, pars. Eighth, Twelfth, Thirteenth (R., 4, 5, 6); Shaw (R., 40, 43, 44).

Defendant, Board of Commissioners of the Palisades Interstate Park, is "a body politic, with power to sue and be sued, to use a common seal, and to make and adopt by-laws to regulate its proceedings" by virtue of section 41, chapter 242 of the laws of 1928, of the state of New York, being Part 9, Article XVI, §746 of the Conservation Law[1] of the state.

The Attorney General is made a party by reason of section 68 of the Executive Law of the state authorizing his appearance in cases involving the constitutionality of any act of the legislature (R., 87).

The Conservation Commissioner is made a party by reason of section 9 of the Conservation Law authorizing him to defend certain actions (R., 87).

The Commissioners of Palisades Interstate Park.

Chapter 170 of the laws of 1900 created a Board of Commissioners of the Palisades Interstate Park[2].

The commission was given power to acquire land *by condemnation* according to procedure carefully prescribed in the act which provided among other things that the commissioners *shall not acquire title or enter into possession of any land until the amount awarded* in a proceeding in the Supreme Court in the Ninth Judicial District *shall have been paid* (Sec. 16)[3].

Article V of the state constitution was amended at the general election of November 3, 1925 by the creation

[1]Appellants' Appendix, p. 28, (R., 87).
[2]Idem, p. 7.
[3]Idem, p. 19.

of twenty departments in the state government (Art. V, §2) and the legislature directed to provide for the appropriate assignment of all the civil, administrative and executive functions of the state government to the several departments (Art. V, §3).

Chapter 242, §41, of the laws of 1928[1] added a new article, numbered XVI and entitled Division of Parks to the Conservation Law.

Section 50 of Chapter 242 of the laws of 1928[2] repealed chapter 170 of the laws of 1900, as amended,[3] and in substance re-enacted sections 1 to 17, inclusive, of the repealed statute as section 745 to 760,[4] inclusive, of the new. These deal with acquisition of lands *by condemnation* in the Supreme Court.

Defendant, Board of Commissioners, has assumed to take the property *by appropriation* under Section 761[5] of the new Conservation Law, Chapter 242 of the Laws of 1928 of the State of New York.

Facts.

The title of Sparkill Realty Corporation to the real property on October 11, 1928, the date of appropriation, and that it had in 1927 leased it to Standard Trap Rock Corporation for quarrying purposes for twenty years with a renewal of twenty more is conceded (Appellants' Brief, p. 6).

---

[1]Appellants' Appendix, p. 27.
[2]Idem, p. 35.
[3]Amended and supplemented by L. 1901, ch. 504; L. 1906, ch. 691; L. 1910, ch. 361 and 362; L. 1913, ch. 420; L. 1914, ch. 15; L. 1915 ch. 562; L. 1917, chs. 71, 168, 251; L. 1919, ch. 6; L. 1920, ch. 283; L. 1922, ch. 79; L. 1924, ch. 354.
[4]Appellants' Appendix, pp. 28-34.
[5]Idem, p. 34.

It is likewise conceded that Standard Trap Rock Corporation "had made extensive preparations for its quarry and at the end of September 1928 was about to begin actual excavation" (Appellants' Brief, p. 6).

The nature of these preparations and their making in reliance upon the statement of the Commission that it was not going to condemn the property, made one year before it served notice of appropriation, and the Commission's acquiescence in the expenditure of a million dollars upon the property are nowhere denied in the appellants' affidavits.

The outstanding facts are:

1. April 13, 1927 Sparkill Realty Corporation and Anderson Dana executed a written agreement granting the latter a sixty day option to lease the property (R., 38).

2. May 19, 1927 Sparkill Realty Corporation leased to Standard Trap Rock Corporation for twenty years with privilege of renewal for an equal period (R., 4, 5, 38) (Bill, Exhibit A, R., 11).

3. On the same day and as part of the same transaction the parties executed a supplemental agreement (Bill, Exhibit B, R., 23) providing that if the Commission should start condemnation proceedings prior to April 20, 1928 the minimum annual royalty of $35,000 payable lessor should not become effective unless and until such proceedings should have been finally discontinued or terminated without vesting of title and ten calendar months have elapsed thereafter.

4. On June 11, 1927 counsel for the defendant Commissioners formally notified plaintiffs that a resolution had been adopted by the Commissioners directing pre-

liminary steps be taken toward the acquisition of the property for park purposes consisting of meadow lands and uplands to the top of the cliff (R., 5, 38).

5. Thereafter the attorneys for appellees advised counsel for the Commissioners of the making of the lease, the incurring of considerable expense and substantial commitments, including an undertaking to equip and complete a large plant and advised the Commission that "in this situation if the property is to be condemned, Standard Trap Rock Corporation naturally wishes to avoid further expense in so far as compatible with its obligations under the lease" (R., 39).

6. On July 12, 1927 the Commission was advised of the readiness of appellees to appear before it and at the request of counsel for the Commission blue prints were forwarded it and permission granted it to make borings. Correspondence between the parties ensued, resulting in a request from its counsel for the submission to the Commissioners of an offer of sale and such an offer was made on the part of appellees (R., 39). Mr. White states a value of $3,000,000 was put on the fee and a value of $5,000,000 on the leasehold, making a total of $8,000,000, which appellees were then ready to accept (R., 60).

7. It is conceded in the affidavit of White that on October 18, 1927, Messrs. Hughes, Rounds, Schurman & Dwight advised the attorneys for the respective appellees by letters containing the following statement (R., 75, 76):

> "Your letter of October 14th, together with other data and information furnished us by you

> or Mr. Hemmens, have been submitted to and considered by the Commissioners of Palisades Interstate Park, who have requested us to report to you that at their meeting today it was decided and resolved by them that their counsel be instructed to take no steps for the condemnation of the Tallman Mountain property."

8. On October 19, 1927 the attorneys for appellees, Standard Trap Rock Corporation, wrote the attorneys for the Commissioners acknowledging receipt of their letter of October 18th and stating:

> "Our clients are accordingly proceeding with the plans which they had made for the development of the quarry and which have been in abeyance since the receipt of your letter of May 13, 1927" (R., 5, 40).

On the same day appellees made their second supplemental agreement (R., 25) which, after reciting the provision of the first (R., 23) with reference to possible condemnation, referred to receipt of the letter of October 18, 1927, extended the lease and provided for payment of an instalment of royalty on February 1, 1928 (R., 26).

9. No further communication, written or oral, was received by either of appellees from the Commissioners or any other Department of the State of New York until August 18, 1928, when they were served with a notice of resolution of the Board of Commissioners of the Land Office requiring cessation of dredging at the plant. The allegation is nowhere denied that this action was taken at the request of the appellant Commissioners, who had

been informed of the plan for dredging eleven months prior thereto (R., 40).

10. Meanwhile, and after appellees had been notified appellant Commissioners would take no step toward the condemnation of their property, appellee, Standard Trap Rock Corporation, in addition to affirming its lease had completed a plant, in the building and equipment of which it had expended and incurred contractual obligations amounting to approximately $1,000,000 (R., 5, 6, 40).

11. October 11, 1929 appellees were served with a notice of appropriation as more fully described later.

Value of Property.

The value of the real property and improvements pleaded in the bill and shown by affidavits is not denied.

The bill alleges (par. Nineteenth, R., 8) that "the real property * * * and the leasehold * * * were and now are * * * of the value at present in excess of three million ($3,000,000) dollars."

The form of allegation is proper and sufficient because:

> "When there are different interests or estates in the property, the proper course is to ascertain the entire compensation as though the property belonged to one person and then apportion this sum among the different parties according to their respective rights."
>
> Lewis, Eminent Domain [3d Ed.], p. 1253.

This is not an attempt to enhance the value by a distribution of the title or estate among the owners of different interests as asserted by appellants in their brief (p. 60). The pleader has followed the rule of entire

compensation stated by Mr. Lewis and alleged value as if there were but one estate in the property. Having previously pleaded the lease (par. Eighth, R., 4) and both parties being plaintiffs the pleader when he came to the allegation of value included all estates in one sum.

The affidavits of Shaw (R., 36, 40, 43, 44), Soper (R., 47), Gucker (R., 48), Lane (R., 50) and Keine (R., 52) prove a value of real property and improvements of $4,000,000.

The only statement on the subject of value presented by appellants is in the affidavit of White (R., 62, 63):

> "I have been advised by our counsel and believe that the value of the property is, as such, not an issue in this litigation,—that the value is to be fixed in the only court in which the State has consented to have a binding adjudication against it—the Court of Claims.[1] In the circumstances, the Commission—though it denies plaintiffs' estimates of value and in the Court of Claims will challenge the figures now presented on behalf of the plaintiffs—will confine itself to stating the conclusion it reached at the time it appropriated.
>
> All of the members of the Commission were familiar with the property and had visited it at one time or another; many of them had visited it shortly before the appropriation; I have been familiar with the property for forty years and had gone over it on many occasions, some of them just before the appropriation. The Commissioners, at the time of the appropriation, came to the conclusion relying upon the experience of the Commission in connection with the acquisition of numerous properties including quarries, the advice of their staff and of other technical experts and the data and reports in their possession that the property

[1]Appellants have withdrawn Assignment of Error 4 (R., 99):
"The Court erred in not dismissing the bill of complaint on the ground that the suit is in reality against the State of New York and with respect to property in its possession, and that the State has not given its consent to be sued." (Appellants' Brief, p. 17).

> was worth less than $600,000, and that the obligation of the State would not exceed that sum. The Commission thereupon sought and obtained an allocation from the bond issue moneys of $600,000 (see Exhibit G attached to the plaintiffs' moving papers)."[1]

Mr. White concedes the property consists of one hundred thirteen and one-half acres of upland and fifty-seven and one-half acres of marsh land (R., 59), and the statements in the affidavit of Shaw (R., 36) that the property contains more than forty million cubic yards of trap rock of the highest quality and grade, all of which is readily and practically available for quarrying and crushing, that the plant is adequate for and capable of crushing, conveying and storing seven hundred and fifty thousand cubic yards of trap rock annually and that the annual profit will be over $500,000 are nowhere denied, nor is any other proof of value on the part of appellees met, but on the contrary it is conceded in the affidavit of White (R., 58) that other quarries taken by his Commission were earning large profits.

The experience of the Commission in connection with the acquisition of other properties, including quarries, does not qualify its members as experts. It is significant the Court has been given the benefit of none of the advice of the staff and technical experts or the data and reports which are in the possession of the Commission, according to the affidavit of White (R., 63).

Appellees on the contrary have furnished the Court:

1. A detailed statement of cost of plant and fixtures (Bill, Exhibit F, R., 32).

2. The quantity of trap rock readily available for quarrying (R., 36, 53).

---

[1]The allocation had in fact been approved several days before the meeting on October 9, 1929 when it was resolved to appropriate the property. (R., 54, 64).

3. The nature and capacity of the plant (R., 36).

4. The cost of operation (R., 37, 49).

5. The market for output (R., 37), all of which is based upon the opinion of the experienced civil and mechanical engineers Shaw (R., 35) and Soper (R., 45), the quarrymen Gucker (R., 47) and Lane (R., 49), the machinery contractor Keine (R., 51) and the surveyor Christie (R., 52).

Opposed to this is the "conclusion" of a party to the suit (R., 63), based on advice, data and reports *in its possession* (R., 63) and not disclosed although confessedly available.

The value of the property is not denied.

The Power to Take.

The commission under the statute which created it (L. 1900, ch. 170, §16)[1] and which has been re-enacted[2] may exercise its power of eminent domain *only by condemnation* and does not acquire title to, or enter into possession of, property taken for park purposes *until the value of the property as fixed by appraisal had been paid to the owner.*

Unless acquisition of lands is completed within eighteen months from the inception of the proceeding the court has discretionary power to discontinue all proceedings (L. 1900, ch. 170, §17)[3] on application of any person interested, a substantial right of the landowner calculated to insure the inseparability of the power to take and indemnity for the taking.

---

[1]Appellants' Appendix, p. 19.
[2]Idem, 28-34.
[3]Appellants' Appendix, p. 19, Section 760, Conservation Law, Idem, p. 24.

Chapter 170 of the laws of 1900 was repealed by chapter 242, §50, of the laws of 1928[1] which, however, reenacted its provisions as part of a new Conservation Law and added a new provision in

> "SECTION 761.[2] Acquisition of lands by entry and appropriation. In addition to the various methods of acquiring lands provided for in this part of this article, the commissioners of the Palisades Interstate Park shall have the power to acquire lands by entry and appropriation in the manner provided for in section fifty-nine of the conservation law."

It was pursuant to this section the Commission assumed to act on October 11, 1928 in appropriating appellees property and it is upon this section appellants rely (Appellants' Brief, p. 8).

Their acts show a recognition of the necessity under any power for an antecedent appropriation of moneys sufficient to pay an award.

On September 29, 1928, eleven days before the Commission met to pass its resolution for the taking (R., 71) the approval of the State Council of Parks (R., 54) and the Governor and Legislative Chairmen *acting pursuant to section 4, chapter 16 of the laws of 1926* were obtained and were signed and filed with the State Comptroller one day before the meeting (R., 55).

Appellants concede in their brief (p. 10) that before any obligation for the expenditure of bond moneys appropriated by chapter 16 of the laws of 1926[3] could be incurred a map of the proposed park and an estimate of cost must be approved by the State Council of Parks, the Governor, the Chairman of the Senate Finance Commit-

---

[1]Idem, p. 35.
[2]Idem, p. 34.
[3](L. 1926, ch. 16, §4, Appellants' Appendix, p. 48).

tee and the Chairman of the Assembly Ways and Means Committee. By virtue of this approval it is asserted $600,000 became available out of bond moneys for the acquisition of lands in the town of Clarkstown and the property of appellees, which alone is worth $3,000,000.

Outline of Argument.

The decree of the District Court should be in all respects affirmed, because

(1) No power exists to pledge the credit of New York.

(2) A taking of property in eminent domain is a violation of due process unless there is provided a sure, sufficient and convenient remedy by which the owner can coerce payment of just compensation.

(3) No enforceable means of obtaining compensation has been provided.

(4) Being without the means of enforcing payment of compensation appellees are injured and may raise the questions presented.

(5) All facts essential to the presentation of the federal question appear by the allegations of the bill of complaint.

(6) Public bodies will be enjoined from illegal acts done under color of right which cause irreparable injury to the property rights of individuals.

(7) The interlocutory decree is proper and grants proper relief.

ARGUMENT.

POINT I.

No power exists to pledge the credit of the state.

Provisions of the state constitution occupy in this suit the position of facts in the chain of causation which brings the Fourteenth Amendment into operation.

Each has been construed by the highest court of the state so that no question of state law is presented upon which the state courts would have to rule before any impediment to appellees' full compensation and consequently any due process question * * * could arise (Appellants' Brief, p. 49).

The settled law of the state compels an application of the Fourteenth Amendment.

Section 21, Article III, Constitution of New York provides:

> §21. Appropriation bills.
> No money shall ever be paid out of the treasury of this State or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within two years next after the passage of such appropriation act; and every such law making a new appropriation or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient for such law to refer to any other law to fix such sum.

Section 4, Article VII,[1] Constitution of New York provides:

> Except the debts specified in sections two and three of this article,[2] no debts shall be hereafter contracted by or in behalf of this State, unless

[1] Not printed in full by appellants, Appendix, p. 5.
[2] Admittedly inapplicable.

such debts shall be authorized by law, for some single work or object, to be distinctly specified therein; and such law shall impose and provide for the collection of a direct annual tax to pay, and sufficient to pay, the interest on such debt as it falls due, and also to pay and discharge the principal of such debt within fifty years from the time of the contracting thereof. No such law shall take effect until it shall, at a general election, have been submitted to the people, and have received a majority of all the votes cast for and against it at such election. On the final passage of such bill in either house of the Legislature, the question shall be taken by ayes and noes, to be duly entered on the journals thereof, and shall be: "Shall this bill pass, and ought the same to receive the sanction of the people?" The Legislature may at any time after the approval of such law by the people, if no debt shall have been contracted in pursuance thereof, repeal the same; and may at any time, by law, forbid the contracting of any further debt or liability under such law;[1] but the tax imposed by such act, in proportion to the debt and liability which may have been contracted in pursuance of such law, shall remain in force and be irrepealable, and be annually collected, until the proceeds thereof shall have made the provision hereinbefore specified to pay and discharge the interest and principal of such debt and liability. The money arising from any loan or stock creating such debt or liability shall be applied to the work or object specified in the act authorizing such debt or liability, or for the payment of such debt or liability, and for no other purpose whatever. No such law shall be submitted to be voted on within three months after its passage or at any general election when any other law, or any bill shall be submitted to be voted for or against. The Legislature may provide for the issue of bonds of the State to run for a period not exceeding fifty years in lieu of bonds heretofore authorized but not issued and shall im-

[1]No power of amendment of a referendum act exists.

pose and provide for the collection of a direct annual tax for the payment of the same as hereinbefore required. When any sinking fund created under this section shall equal in amount the debt for which it was created, no further direct tax shall be levied on account of said sinking fund, and the Legislature shall reduce the tax to an amount equal to the accruing interest on such debt. The Legislature may from time to time alter the rate of interest to be paid upon any State debt, which has been or may be authorized pursuant to the provisions of this section, or upon any part of such debt, provided, however, that the rate of interest shall not be altered upon any part of such debt or upon any bond or other evidence thereof, which has been, or shall be created or issued before such alteration. In case the Legislature increase the rate of interest upon any such debt, or part thereof, it shall impose and provide for the collection of a direct annual tax to pay and sufficient to pay the increased or altered interest on such debt as it falls due and also to pay and discharge the principal of such debt within fifty years from the time of the contracting thereof, and shall appropriate annually to the sinking fund moneys in amount sufficient to pay such interest and pay and discharge the principal of such debt when it shall become due and payable.

Newell v. *The People,* 7 N. Y. 9, 106.

In 1851 the legislature passed an act for completion of the Erie Canal (L. 1851, ch. 485). It provided for Canal Revenue Certificates in a form containing the words "without any other obligation, liability or pledge on the part of the state of New York, than such as is contained in said act."

The act provided:

"§14. In case of any failure of revenues from the canals, by reason of pestilence, deficiency of

crops, or breaches, or damages to the canal, or from any other cause, the state shall in no event be liable to make up the deficiency of revenue, or to redeem the canal revenue certificates in any other manner than out of the canal revenues of the state, as directed by the provisions of this bill for that purpose. The certificates to be issued under this act shall in no event or contingency be so construed as to create any debt or liability against the state or the people thereof within the meaning of section twelve, article seven, of the constitution."

The Court of Appeals wrote of this section, now Section 21, Article VII:[1]

"The section of the constitution referred to had already rendered it impossible that the certificates should create any debt or liability against the state or the people, and a legislative provision of this sort was not necessary for the protection of that instrument. Is its effect to preclude us from inquiring whether the certificates, or the provisions of the act taken in connection with the certificates, purport to create a debt or liability against the state or the people thereof? We think not. It does not alter, or profess to alter, any one provision of the act. It leaves them all standing on the statute book, with the apparent force of law, and with the sanction of legislative approval, forming together a single scheme for raising money, on the faith of which capital is invited to assist the state. *Under this state of things, can we be asked to take the ground that the state is to be regarded as coming into the money market, with a cunningly devised plan of promises, seemingly efficacious, but really known to be wholly unlawful and incapable of conferring any legal right, and by such means seeking to procure the advance of money? The respect which we owe to the leg-*

[1]Appellants' Appendix, p .4.

islature forbids us to listen for one moment to the suggestion."[1] (Italics supplied).

People of N. Y. v. *Canal Board of N. Y.*, 55 N. Y. 390.

There a statute (L. 1872, ch. 740) directed an examination by the canal board of expenditure for a specific improvement and authorized the board to allow and the auditor to pay, out of moneys appropriated or to be appropriated, any excess of expense over prices actually paid for the improvement.

The Court of Appeals said of the Canal Board:

> "They are in no sense custodians of the public funds or trustees of the public moneys or credit" (p. 398).[2]

With reference to the constitutional restriction on disbursement of public funds the opinion reaffirmed the rule that:

> "No moneys can be drawn from the treasury except in pursuance of an appropriation by law; and every act making an appropriation must distinctly specify the sum appropriated and the object to which it is to be applied" (p. 399).

Peo. ex rel. Hopkins v. *B'd Suprs., Kings Co.*, 52 N. Y. 556.

There the Court of Appeals held unconstitutional an act of the legislature (L. 1872, ch. 700) authorizing the creation of a debt to meet deficiencies in the canal and general funds. The opinion states:

---

[1]This is exactly the kind of promise put forward by appellants and called a pledge of credit.

[2]These Commissioners assert this power is in the Conservation Commissioner.

> "Neither the legislature nor the officers and agents of the state, or all combined, can create a debt or incur an obligation for or in behalf of the state, except to the amount and in the manners provided for in the constitution." (p. 563).

The particular statute was held void:

> "But the whole theory of the act is entirely subversive of the Constitution. It proceeds upon the assumption that a state debt may be created and exist outside the constitution, either by act of the legislature, or the acts of the administrative or executive officers and agents of the state; that, notwithstanding the stringent provisions of the organic law of the state, expenses may be authorized and liabilities incurred in advance and in excess of money provided, which must be met either by direct taxation or by borrowing." (p. 563).

The purpose of the Constitution was found to be to prevent the creation of floating debts.

These appellants assert that the Conservation Commissioner's approval of this taking (R., 73, 74) "brought all the resources of the State within that pledge of its general credit which section 59 of the Conservation Law gives". (Appellant's brief, p. 11).

The cases cited establish that neither the legislature nor the officers and agents of the State, or all combined, can pledge its credit.

In *Pauchogue Land Corporation* v. *Long Island State Park Commission,* 243 N. Y., 15, in a dictum on which appellants greatly rely, the Court recognizes that no money can be paid out of the treasury of the state or any funds under its management except in pursuance of an appropriation by law (Section 21, Article III). Commenting upon the danger of the power in that case the Court says:

"If its contention is tenable, the conclusion logically follows that it has a 'charter as wide as the wind withal' and it might seize for park purposes all the land in Suffolk and Nassau Counties and send the claimants to the Court of Claims to establish their damages" (p. 25).

POINT II.

A taking of property in eminent domain is a violation of due process unless there is provided a sure, sufficient and convenient remedy by which the owner can coerce payment of just compensation.

Appellants assert that a pledge of the general credit of the state assures just compensation and satisfies the constitutional requirement of due process (Appellant's Brief, p. 19).

The phrase "pledge of general credit" arose when statutes were first enacted which vested title to land taken in eminent domain prior to actual payment of compensation. It was soon established in New York under its constitution that such a pledge must amount to a lien upon a specific fund antecedently appropriated. The cases cited in Point I, supra, so hold and there are many more.

Sage v. *The City of Brooklyn*, 89 N. Y. 189.

There the Legislature of New York, by Chapter 631 of the Laws of 1868, widened Sackett Street in the City of Brooklyn, appointing commissioners to assess the expense upon property within a specified area of assessment. The total awards amounted to $334,000 while the amount paid in to the treasury by special assessment was only $280,000.[1] The action was brought by unpaid

[1]Just as here $600,000 is said to be available for property worth $3,000,000.

owners of lands taken in the proceeding to recover their awards as a debt. Liability was denied by the defendants upon the ground that the widening was a State and not a municipal improvement.

Chief Judge ANDREWS wrote:

> "If no immediate or ultimate duty is imposed on the city to pay the awards, or make good any deficiency in the assessment fund, then we repeat the plaintiffs are without remedy to recover their award. The position of the city, if sustained, leads to the inevitable conclusion that the lands of the plaintiffs were never lawfully taken for the improvement, that their title has never been divested, and that they may now enter upon and reclaim the exclusive possession of the lands of which they have been deprived."

So, in the present case, there being no tribunal in which these plaintiffs may recover an award, their title has never been divested.

Continuing upon the subject of a pledge of the public credit, the learned Chief Judge wrote:

> "The courts in construing the constitutional guaranty have departed from what may seem its plain and natural meaning, and have held that the payment for property taken in invitum for public use, need not be concurrent with the taking, but that it is sufficient if the law authorizing the taking, also provides a sure, sufficient and convenient remedy by which the owner can subsequently *coerce payment by legal proceedings.* If such provision is not made, then, as was said by Nelson, Ch. J. 'the law making the appropriation is no better than blank paper.' (People ex rel. Utley *v.* Hayden, 6 Hill, 359). It is, I think, a plain proposition, that a law authorizing the taking of a man's land, and remitting him for his sole remedy for compensation to a fund to be obtained by taxation of certain specified lands in a limited district, according to benefits, is not a sure and adequate pro-

> vision, depending upon no 'hazard, casualty or contingency whatever,' such as law and justice require to meet the constitutional requirement. The pledge of the faith and credit of the State, or of one of its political divisions, for the payment of the property owner, *accompanied with practical and available provisions for securing the application of the public faith and credit to the discharge of the constitutional obligation of payment,* has been held to be a certain and sufficient remedy within the law. But a remedy for compensation, contingent upon the realization of a fund from taxation for benefits within a limited assessment district, does not meet the constitutional requirement. The inadequacy of such a provision finds in the circumstances of this case ample illustration. (See Chapman *v.* Gates, 54 N. Y. 146.)" (Italics supplied).

In other words, the Constitution creates an obligation on the part of the legislature to furnish a means of payment and, while a taking before payment is "a departure from what may seem its plain and natural meaning", a pledge of the faith and credit of the State justifies a taking before actual payment, but the pledge must be enforceable against an existing fund. A taking before payment is justified only where an accompanying appropriation is subjected to a lien by the guaranty of the public faith and credit that the money appropriated will not be used for any other purpose and will remain, pending the determination of value, subject ultimately to execution for payment.

Litchfield v. *Bond,* 186 N. Y. 66.

There the state engineer had entered upon plaintiffs' land under an act of the legislature providing for the laying out of county lines and had cut a slash through woodlands.

The Court of Appeals says of the statute (L., 1902, ch. 473):

"Such a statute, if intended to authorize the exercise of the right of eminent domain, would be clearly unconstitutional, because it makes no provision for compensation to those whose private property is taken for a public use. While payment need not precede the taking, *the provision for compensation must not only pre-exist, but it must be so definite and certain as to leave nothing open to litigation except the title to the property taken and the amount of damages which the owner may recover*" (p. 74).

"If the occupation is to be permanent or the damage is to be substantial then the state and those assuming to act under it must invoke those powers under which such things may lawfully be done" (p. 79).

"* * * it is fundamental that, although payment need not precede the taking, *the provision for compensation* is an indispensable precedent" (p. 81). (Italics supplied).

Decisions of this Court cited by appellants establish the same construction of the Fourteenth Amendment here.

Sweet v. *Rechel*, 159 U. S. 380, 402.

A Massachusetts statute of eminent domain provided for execution against the City of Boston or the Boston Water Power Company and the question before the Court was whether the constitution required compensation be *paid* the owner *before* title vests. No such contention is made by these appellees. On the contrary they rely upon the proposition here laid down and subsequently followed:

"It is equally clear that an adequate provision is made when the statute, authorizing a public municipal corporation to take private property for public uses, directs the regular ascertainment, without improper delay and in some legal mode, of the damages sustained by the owner and gives

him an unqualified right to a judgment for the amount of such damages *which can be enforced,* that is, *collected* by judicial process" (Italics supplied).

It is worth noting that execution against a private corporation was given by the statute and that under the decisions of the Supreme Judicial Court[1] if the landowner took proper measures to have his compensation determined and it was not ultimately paid a court of equity would enjoin the further use of it and the owner could retake the land.

Backus v. *Fort Street Union Depot Co.,* 169 U. S. 557.

There the act under which the property was taken, § 3468—Sec. 11, provided the company should be entitled to enter upon and take possession of and use the land and other property on payment or deposit of the sum fixed by commissioners or a jury to be paid as compensation for such land and other property and for costs, expenses and counsel fees. *Such a privilege is still open to this Commission under the provisions of Section 759 of the Conservation Law*[2] *which reenacted those of Section 16 of Chapter 170 of the Laws of 1900.*[3]

It is moreover significant that under the general Condemnation Law of New York,[4] which contains a similar

[1]Attorney General v. Old Colony Railroad, 160 Mass. 62, 90.
[2]Appellants' Appendix, p. 33.
[3]Idem, p. 19.
[4]L. 1920, ch. 923.

provision postponing delivery of possession until payment (Section 17), it is provided in Section 24[1] that the condemnor may

> "be permitted to enter immediately upon the real property to be taken, and devote it temporarily to the public use specified in the petition, upon depositing with the court the sum stated in the answer as the value of the property * * * ."

Adirondack Ry. v. *New York State,* 176 U. S. 335.

It was conceded upon the argument below that the Adirondack Park Act (L. 1897, Ch. 220), called by appellants the parent statute whose place the Conservation Law now takes, contained an appropriation of $600,000 for the purposes specified in the act. The portion of the opinion of this Court quoted by appellants in their brief (p. 24) citing Sweet *v.* Rechel, supra, and thus establishing its effect, requires "a certain, definite and adequate source of payment" and in finding "the state treasury is the source of payment" it is perfectly evident Mr. Justice Brewer was referring to the amount appropriated by the Act itself.

Matter Appl'n Mayor, etc., of City of N. Y., 99 N. Y. 569, 577.

There the Court of Appeals wrote:

> "It is further objected to the act, that it makes no provision for just compensation to those whose lands are taken, and so violates section 6 of article 1 of the Constitution. While it is not necessary,

[1] L. 1923, ch. 246.

> in advance of the taking, to pay to the landowner his compensation, it is necessary that the act which invades his ownership shall provide for a certain and definite and adequate source and manner of payment. (*Sage* v. *City of Brooklyn,* 89 N. Y. 189). *This necessity is vital and of the most essential character, since if unheeded or disregarded, it transforms the right of eminent domain into a legalized plunder of the citizen.* But this act does not so offend. It puts the public purse of the city behind the debt as the source of its payment. By section 4 the municipality is required within four calendar months after the confirmation of the report of the commissioners, to pay the compensation awarded to the parties interested, and if payment be not so made, those to whom it is due may, after demand, maintain an action against the city. Nothing in this record shows that the municipality has already reached the limits of its capacity to contract debt, or cannot legally incur the new liability. There is no ambiguity or uncertainty about this provision, and the citizen is not turned over to the blind remedy of uncertain and complicated assessments, and a devious and doubtful litigation."
>
> *Williams* v. *Parker,* 188 U. S. 491.

The facts of this case insofar as they are stated in appellants' brief are correctly stated.

Actually, however, it is no more than a writ of error to this Court from a denial by the Supreme Judicial Court of a motion for a continuance. This is recognized in appellants' brief (p. 25) where it is stated the owners opposed the application of the attorney general "and contended the enforcement of the statute against their

property ought to be 'stayed until the city's liability could be conclusively determined' (188 U. S. at 493)."

The transcript of record in this Court (p. 14) shows a motion for continuance stating:

> "Under the circumstances it is unjust and inequitable that defendants should be restrained * * * until it is settled that they have a constitutional right to full compensation for the easement in their land taken by the statute and to the damages which they will suffer if their right to maintain the structure is interfered with; which question cannot be determined upon the present information but can only be determined in the pending action for damages against the City of Boston."[1]

In this Court the argument was entirely directed to one question. The brief of plaintiffs in error (p. 15) quoted by Mr. Justice Brewer states:

> "Shortly stated, the question which arises is substantially this: 'Is it consistent with the Federal requirement of due process of law, in the Fourteenth Amendment, for a state court to enforce, by dispossession and destruction of property, a statute of eminent domain, to the validity of which due provision of just compensation is essential, while the questions whether the statute contains any valid and enforceable provision for compensation or damages and the resulting question whether there has been any valid taking of rights in the property are uncertain and are actually disputed in litigation and undetermined.' "

[1]Under the rule in Great Falls Mfg. Co. *v.* Attorney General, 124 U. S. 589, infra p. 37, the action against the City of Boston estopped plaintiff from raising any question of sufficiency of remedy and restricted it to argument based on possibility of success by the City in the other action.

The meaning of Mr. Justice Brewer is quite plain therefore when he says "no question is made as to the general solvency of the City of Boston" (p. 503).[1] As in *Sweet* v. *Rechel, supra,* provision was made for a judgment against the city and no constitutional provision forbade its payment as in the present case where a judgment of the Court of Claims would be *brutum fulmen.* The solvency of Boston, so far as the record shows, was not argued in this Court and it having been determined by the Supreme Judicial Court that the legislature might impose the burden of payment on the city of Boston this Court held the statute was not in conflict with the Federal Constitution.

Williams v. *Parker* has been cited:

In *Mt. Vernon Cotton Co.* v. *Alabama Power Co.,* 240 U. S. 30, 33 where it is stated:

> "The right to take possession before the compensation is finally determined also is not argued. *Williams* v. *Parker,* 188 U. S. 491, 502";

In *Joslin* v. *Providence,* 262 U. S. 668, 677 in a statement that there must be "adequate provision for enforcing the pledge";

In *Bragg* v. *Weaver,* 251 U. S. 57, 62 on the subject of taking prior to payment of compensation.

Crozier v. *Krupp,* 224 U. S. 290.

In *Crozier* v. *Krupp* the bill of complaint alleged the plaintiff owned patents for improvements in guns and gun carriages and that defendant, William Crozier was making and using guns which embodied in their construction the patented devices.

---

[1]Under the rule in the Great Falls Mfg. Co. Case no such question could be raised by plaintiff.

A stipulation (R., 10) was made by the parties and it was upon this stipulation that the case came up on demurrer. The relevant portion of the stipulation is as follows:

> "Defendant stipulates and agrees that the Government of the United States of America and the Ordnance Department of said Government have manufactured. are now manufacturing, and intend to continue the manufacture and use, or to cause to be manufactured for their use, field guns and carriages made after the so-called 'Model of 1902' referred to in the bill of complaint, the claim[1] or claims of complainant being in nowise admitted; that the defendant, William Crozier, sued in this suit is an officer in the United States Army and Chief of the Ordnance of the United States Army, and is the officer in charge of such manufacture of said field guns and carriages for the United States."

The Supreme Court of the District of Columbia sustained the demurrer and dismissed the bill. The Court of Appeals having reversed the decision of the lower court defendant petitioned this Court for certiorari. The Solicitor General in the petition for certiorari wrote in part as follows:

> "The property element which was referred to in the case of Belknap *v.* Schild[2] and in the case of the International Postal Supply Co. *v.* Bruce,[3] is also present in a large sense in the case at bar. The raw materials and the crude products which are in process of being bound and assembled in the complete design are the properties of the United

[1] Of a patent or its infringement.
[2] 161 U. S. 10.
[3] 194 U. S. 601.

> States. The physical things, the subject of the alleged infringement, whether already matured in the process of construction, in the finished model or as yet in fieri, are solely the property of the United States. The Model of 1902, according to which the Government is manufacturing its field guns, is the Government's own model and its sole property. The arsenals at Watervliet and Rock Island and the work-shop at Bridgeport are the Government's possessions. More especially the very employment and enterprise of the Government to manufacture ordnance as a necessary means to perform its sovereign duty in maintain an army is exclusively the Government's right of property and is especially entitled to the protection of the court."

The writ of certiorari having been granted the Attorney-General in his brief wrote:

> "Consequently the exact question presented upon this record is whether the courts have any jurisdiction *to restrain the United States* from the manufacture of ordnance, in the course of its work in equipping and maintaining its army because of the claim of a German company that such manufacturing employs its inventions without its consent."

The Attorney-General in his brief quotes *Minnesota* v. *Hitchcock,* 185 U. S. 373, for the proposition that the question whether the United States is a party to the controversy is not determined by the mere nominal party on the record but by the kind of judgment or decree which can be entered and continues:

> "The respondent makes no claim that it has title to the materials of which the models are made, as indeed it could not do. Its claim is that the

infringement occurs in the combination or fashioning of these materials into the models, so that the act sought to be restrained is the combining, the fashioning or the making. *But this is an intangible and immaterial act springing out of the manipulation and utilization of actual and tangible property of the United States.* Accordingly the force of the injunction does not strike the intangible and technical trespass involved in the mere borrowing, if such the fact be, of respondent's devices but behind that strikes upon the actual use of the physical property of the United States in which such a borrowing of ideas may be employed. * * * Even though the Government made compensation for the articles the respondent would have it that by virtue of letters patent of the United States it was entrenched in a position where it could refuse to sell these articles to the United States and prohibit the United States from taking them, even upon making proper compensation. *It is submitted that a very important branch of public policy supports the doctrine of the immunity of the United States from being sued and enjoined by a patentee under such circumstances as these.*" (Italics supplied.)

This argument explains fully the language of the opinion of this Court (p. 305) where, after stating the provisions of the act of 1910 giving patentees the right to recover reasonable compensation for infringement by the United States in the Court of Claims, the Chief Justice continues:

> "This being the substantial result of the statute, it remains only to determine whether its provisions are adequate to sustain and justify giving effect to its plain and beneficent purpose to furnish additional protection to owners of patents when their rights are infringed by the officers of the Government in the discharge of their duties.

"This inquiry may be solved, under the conditions here involved, by taking the most exacting aspect of the well established and indeed elementary requirements in favor of property rights essential to be afforded in order to justify the taking by government of private property for public use. Indisputably the duty to make compensation does not inflexibly, in the absence of constitutional provisions requiring it, exact, first, that compensation should be made previous to the taking—that is, that the amount should be ascertained and paid in advance of the appropriation—it being sufficient, having relation to the nature and character of the property taken, that adequate means be provided for a reasonably just and prompt ascertainment and payment of the compensation; second, that, *again always having reference to the nature and character of the property taken, its value and the surrounding circumstances,* the duty to provide for payment of compensation may be adequately fulfilled by an assumption on the part of government of the duty to make prompt payment of the ascertained compensation—that is, by the pledge, either expressly or by necessary implication of the public good faith to that end.

"Coming to apply these principles and *confining ourselves in their application, as we have done in their statement, strictly to the conditions here before us, that is, the intangible nature—patent rights—of the property taken, the great possibilities in the essential operations of government that such rights may be invaded by incorporating them into property of a public character, of the vital public interest involved in the subject-matter of the patents in question and the grave detriment to the very existence of government which might result from interference with the right of the government to make and use instrumentalities of the character of those with which the patents in question are concerned,* of the purpose which the statute manifests to add additional protection and sanction to private rights, and the pledge of the good faith of the government which the statute plainly implies to appropriate for and pay the

compensation when ascertained as provided in the statute, we think there is no room for doubt that the statute makes full and adequate provision for the exercise of the power of eminent domain for which considered in its final analysis it was the purpose of the statute to provide. *Indeed, the desire to confine ourselves to the particular case before us* has led us to state and limit the doctrine which we here apply, when it was possibly unnecessary to do so. *We say this because no contention was made in argument by counsel for the corporation that the statute of 1910 does not provide methods of compensation adequate to the exercise of the power of taking for which the statute provides.* Thus, in the argument, it is said: 'If the officers of the United States have since the act * * * used or shall hereafter use complainant's patented design, it is possible or probable that complainant may receive reasonable compensation under the act in the Court of Claims,'—this statement being followed by an insistence that even although this be the case the statute is not controlling because it was enacted after the bill was filed and did not therefore retroactively deprive the court below of the power to afford relief under the conditions existing when the suit was commenced." (Italics supplied.)

Hays v. *Port of Seattle,* 251 U. S. 233.

This case involves no question of eminent domain. The plaintiff in error had made a contract with the State of Washington to dredge Smith's Cove in Seattle. The legislature then passed an act creating the Port of Seattle, abandoning the improvement on which plaintiff was engaged and vesting title to the waterway in the Port (Sess. Laws, 1913, p. 195).

No land of plaintiff or anyone for that matter was taken, the only question being whether the obligation of the contract to dredge Smith's Cove was impaired in violation of Section 10, Article I of the Federal Consti-

tution and whether under the Fourteenth Amendment compensation must be provided for such impairment. This Court held that at most there was a breach of contract for which plaintiff might be remitted to an action for damages under the Washington Code.

The Code provision for an action and payment of judgment out of the state treasury was held sufficient due process as "an adequate provision for assured payment" (p. 225) *no question being raised anywhere in the case of the enforcibility of the judgment, or availability of funds for its payment.*

Joslin v. *Providence,* 262 U. S. 668.

There the municipality was empowered to condemn land and the record shows and Mr. Justice Sutherland drew attention to the fact that "as an additional guaranty that the judgment will be paid, and paid promptly, the owner under the statute may have execution against the City."

Bragg v. *Weaver,* 251 U. S. 57.

There the record discloses and Mr. Justice Van Devanter emphasizes that:

> "It is conceded that the taking is under the direction of public officers and is for a public use; also that adequate provision is made for the payment of such compensation as may be awarded. Hence no discussion of these matters is required."
>
> *Pauchogue Land Corporation* vs. *Long Island State Park Commission,* 248 N. Y. 635; c. d. 278 U. S. 657.

This was the second decision of the Court of Appeals in the Pauchogue case. The judgment was affirmed in a memorandum decision:

"Judgment affirmed, with costs, upon the ground that the property in suit has been lawfully appropriated (243 N. Y. 15)."

Examination of the record shows that prior to September 23, 1925 the Long Island State Park Commission received from Mr. August Heckscher a gift of $250,000 with interest at 6% for ten months deposited in Empire Trust Company for the express purpose of establishing its title to the land involved in the action. Upon the prior appeal the Court of Appeals had held, irrespective of any other question raised, that the appropriation and entry on December 4, 1924 was illegal by reason of the provision in Chapter 112 of the Laws of 1924, Section 8, giving the Commission power from "monies or property on hand *or* appropriated for its use to acquire and make available for use as public parks or parkways all such real estate as is or may come under its jurisdiction." The Court of Appeals held this at once a grant of power and a limitation on the exercise of such power and finding no other grant of general power in the Act held that in the absence of an appropriation by the Legislature the entry was illegal.

Subsequent to Mr. Heckscher's gift, and on September 23, 1925, the Commission made another entry and appropriation. It was shown at the trial that the amount of the Heckscher gift was more than the plaintiffs had been willing to accept at the outset of negotiations and evidence of value was produced by the Commission in the form of expert testimony. Any substantial federal question left the case when the Court found the property not worth more than the moneys on hand.

Upon the first appeal, Judge POUND wrote (243 N. Y. 15, 26):

"We come next to a question of statutory construction rather than one of constitutional law.

> Section 8, Laws of 1924, Chapter 112, defines the general powers of the Commission. 'It shall have power from monies or property on hand or *appropriated for its own use* to acquire and make available for use as public parks or parkways all such real estate as is or may come under its jurisdiction.' This is at once a grant of power and a limitation on the exercise of such power. It may acquire real estate for park purposes from money on hand or appropriated for its own use. No other grant of general power is contained in the Act."

The first appeal therefore was decided without reference to any question of constitutional law, demonstrating that the language of the learned Judge as to a pledge of public faith and credit upon which these defendants rely was dictum and by way of covering points in the briefs.

Although the second appeal was in the same action, the case involved a separate and distinct entry in September 1925 after a sum greater than that which the plaintiffs had been willing to accept and also greater than the value of the property as proved by competent evidence had become available. Once the Court of Appeals decided that this sum of money was available to pay compensation the constitutional question left the case and the only question which remained was "a question of statutory construction" involving no substantial federal question.

It is apparent from the briefs both in the Court of Appeals and upon the application to the Supreme Court for a writ of certiorari that no constitutional question was involved because the Long Island State Park Commission was in funds sufficient to provide adequate and certain compensation and applicable to no other purpose.

It is not a fact as stated by appellants that in the first Pauchogue Case "The Court of Appeals expressly over-

ruled the constitutional objection, finding the pledge of the general credit of the State, given by Section 59, a complete answer (243 N. Y. at pp. 24-5)" (Appellants' Brief, p. 32). Both appeals were decided as questions of statutory construction.

Two other cases cited by appellants for the proposition that no antecedent appropriation of funds is necessary in eminent domain illustrate how far short of sustaining this proposition their authorities fall.

> *Great Falls Mfg. Co.* v. *Attorney General,* 124 U. S. 581, 599.

This case is cited (Appellants' Brief, p. 46) in support of an alleged presumption that the sovereign will pay its debts and discharge its obligations. The statute there under consideration was the Act of Congress approved July 15, 1882 (22 Stat. at L. 168) of which section 1 provided:

> "* * * and, upon payment being made therefor, or, without payment, upon the expiration of the times above limited without the filing of a petition, an absolute title to the premises shall vest in the United States."

On the question of enforcing payment, this Court said of the effect of a suit commenced in the Court of Claims:

> "By the same act it has estopped itself from suggesting that no judgment obtained in the Court of Claims can be enforced against the United States, but must wait an appropriation for its payment. When it resorted to that Court, it knew that its judgments against the United States could only be paid out of money appropriated for that purpose by Congress. In short the plaintiff has voluntarily accepted the provisions of the Act of Congress in respect to the mode of ascertaining the

compensation to be made to it. *This view cannot work any permanent injury to the plaintiff; for that Act expressly declares that title to the premises in question shall not vest in the United States until the owner receives payment therefor.*"

Shoemaker v. *U. S.*, 147 U. S. 282, 285-6[1].

The Act of Congress approved September 27, 1890 (26 Stat. at L. 492) provided in Section 3 for appraisal of land taken and continued:

> "And if in any case the owner or owners of any portion of said land shall refuse or neglect, after the appraisement of the cash value of said lands and improvements, to demand or receive the same from said Court, *upon depositing the appraised value in said Court* to the credit of such owner or owners, respectively, the fee simple shall in like manner be vested in the United States."

Section 5 provided:

> "That no delay in making an assessment of compensation, or in taking possession, shall be occasioned by any doubt which may arise as to the ownership of the property, or any part thereof, or as to the interests of the respective owners. In such cases the Court shall require a deposit of the money allowed as compensation for the whole property or the part in dispute. In all cases as soon as the said Commission *shall have paid the compensation assessed, or secured its payment by a deposit of money under the order of the Court, possession of the property may be taken.*"

Rockaway Pacific Corp. v. *Stotesbury*, 255 Fed. 345.

This case settles all the questions in the present suit. Appellants assert (Brief, p. 43) that:

> "The statutory court entirely misconceived the legislation involved in Rockaway Pacific Corpora-

[1]Cited Appellants' Brief, p. 39.

> tion *vs.* Stotesbury, and therefore misconceived the decision rendered".

It is as impossible to infer from the title of the Act in that case that its purpose was to turn land over to the Government of the United States as it is to find in the body of it an intention "that the property thus taken should be paid for not by the State but by the Federal Government". It is because of such an intention, according to appellants, that the statute did not pledge the credit of the State and is therefore distinguishable from the statute here.

The opinions of Ward and Rogers, Circuit Judges, (255 Fed. 345, 346, 351) show their decision was not based upon any lack of such a pledge of State credit but upon decisions summarized by Judge Ward (p. 350):

> "Still an appropriation law must be passed, because in no other way can compensation be secured in accordance with the provisions of the constitution and the long established practice under it,"

a conclusion in which Judge Rogers concurred, citing State and Federal decisions.

The dissenting opinion of Judge Hough emphasizes the *ratio decidendi* of the majority because he was of opinion that "the statute complained of does pledge the credit of the State and the public purse to make full reparation to plaintiff". The opinion of Judge Ward, based upon the provision of Section 21, Article III, of the Constitution of New York forbidding the payment of money out of the treasury of the State or any of its funds or any funds under its management, except in pursuance of an appropriation by law, shows, (in connection with his statement that "it was not thought sufficient to leave the citizen to the obligation to pay that might be implied by law", (p. 348), and Judge Rogers' statement (p. 353) "so that at this time no adequate means are provided whereby the owner of the property can be compensated

for its taking''), that the *Rockaway* case distinctly holds a pledge in any language, however ''express and unmistakable,'' is insufficient for a taking by due process.

One paragraph in the opinion of Judge Ward determines that the *Rockaway* case is exactly in point and decisive of the question here:

> ''We think that, to make chapter 13 of the Laws of 1917 constitutional, it must be accompanied by a law appropriating funds to pay such an award as the Court of Claims shall make. The amount of the compensation is a judicial, and not a legislative, question. Still an appropriation law must be passed, because in no other way can compensation be secured in accordance with the provisions of the Constitution and the long established practice under it.''

The act was therefore held unconstitutional not because in the language of appellants (p. 44) it ''omitted to pledge the State's credit'' but because it was not ''accompanied by a law appropriating funds to pay such an award as the Court of Claims shall make.'' This is exactly the contention of the appellees and the reason for the decision below in the present case.

POINT III.

No enforceable means of obtaining compensation has been provided.

In the court below appellants relied upon a pledge of the credit of the state. Here we are offered (1) Assets outside of bond moneys; (2) Bond issue moneys; (3) General funds of the State. (Appellants' Brief, p. 8 et seq.).

(1)

Assets outside of bond moneys (p. 8).

The supplementary affidavit of White (R., 78):

> "In view of the statements upon the argument, I wish to put upon the record that the New York Commission, on October 9, 1928 (when the Commission offered the plaintiffs $500,000 for the property in suit), and on October 11, 1928 (when the said property was appropriated), had on hand over and above the bond moneys appropriated by L. 1926, Ch. 16, reappropriated by L. 1928, Ch. 75, Part V, and any allocation therefrom—moneys, securities and other properties which could be lawfully used for the acquisition of lands for park purposes in any manner, and which I am informed and believe were of a value in excess of $500,000."

On October 9, 1928 when the Commission offered $500,000 for the property it had already obtained an allocation of that amount (R., 54, 55). It is to be presumed it was this money was offered, $100,000 being reserved for the land in Clarkstown (R., 55).

Ten days after the argument in the District Court the president of the Commission sought to stop the breach with the indefinite statement we have quoted. How much money, the nature and value of the securities or the nature and value of the other properties, none of this is stated. For their availability we have only the affiant's conclusion. For their total value only his information and belief. The statement would be more plausible had the affiant stated with the exactness at his command as president just what his commission possessed and why available for eminent domain. Conclusions do not take the place of facts.

Appellants seek to bring themselves within the rule in the *Pauchogue Case, supra.* There the Long Island State Park Act (L. 1924, ch. 112, §8) provided:

> "It shall have power from monies or property *on hand* or appropriated for its own use to acquire and make available for use as public parks or parkways all such real estate as is or may come under its jurisdiction."

The Conservation Law under which this present Commission acted creates an additional power to be exercised in the manner prescribed by Section 59 but nowhere gives a power to acquire by appropriation with "moneys on hand" the provision being for acquisition "when moneys have been appropriated therefor".[2]

Once Mr. Hecksher made his gift to the Long Island Commission it had $260,000 as "monies on hand" with which the statute gave it power to acquire the land by appropriation under sections 18 and 21 of the act creating it.

The present Commission is given no such power for no such provision is found in any portion of the law governing it.

(2)

Bond issue moneys (p. 8).

Chapter 602 of the Laws of 1924[1] provides for the issuance of bonds of the State in an amount not to exceed Fifteen million dollars, the proceeds of which are to be paid into the State Treasury and so much thereof as may be necessarily expended is appropriated for the development, improvement and extension of State parks, including the acquisition of lands for that purpose.

[1]Appellants' Appendix, p. 36.
[2]Section 50, idem, p. 22.

Nine separate provisions for as many separate purposes in different localities are made, each provision prescribing the amount which may be appropriated for each purpose (Section 3).

Section 4 of the act provides, "The moneys for the development, improvement and extension of the Palisades Interstate Park shall be expended and the lands shall be acquired by the commissioners of the Palisades Interstate Park *under the provisions of Chapter 170 of the Laws of 1900, as amended*".[1]

Section 5 of the act provides, "The moneys appropriated for the acquisition of lands under this act shall be available for the payment of the purchase price where lands are acquired by contract or for payments of judgments and awards in case of purchase *by condemnation.* Moneys appropriated for the acquisition of *forest preserve lands,* and of lands in the *Allegheny state park* shall also be available for the payment of judgments and awards in case of proceedings *by entry and appropriation.*"[2]

Section 7 of the act provides that it shall not take effect until after submission to and approval by the people at the general election in November 1924 and prescribes the form of ballot; the form reads: "Shall Chapter 602 of the Laws of 1924 * * * be approved?"

At the general election of 1924 the question was so submitted and received the approval of a majority of all the votes cast for and against the law.

Referendum laws rank next in importance to the constitution and cannot be changed or modified in respect of basic requirements by subsequent legislation.

Half Moon Bridge Co. v. *Canal Bd.*, 91 Misc. 600.
Op. Atty. Gen. (1916) 123.

---

[1]Appellants' Appendix, p. 38.
[2]Note distinction between methods of acquiring land in forest preserve or Allegheny park and in the Palisades.

After the bond issue had been approved by the people as required by Section 4 of Article VII of the State constitution the legislature passed another act, chapter 16 of the laws of 1926.[1]

This act makes fifteen separate appropriations for as many separate purposes stating the amount for each. Among others the same amount, $3,500,000, is appropriated for the Palisades Interstate Park.

Section 2, subdivision 2, repeats in the exact language of Chapter 602 of the laws of 1924, supra, the manner in which the appropriation for the Palisades Interstate Park shall be spent, namely condemnation.[2]

Two years elapsed and the commissions found themselves confronted with the provision of Section 21, Article III of the constitution that no money can be paid out of the state treasury "except in pursuance of an appropriation by law; nor unless such payment be made within two years next after the passage of such appropriation act".

Apparently $11,912,850.58 out of the separate appropriations aggregating $15,000,000 remained unspent.

Chapter 75, Part 5,[3] of the Laws of 1928, attempted to reappropriate and make "immediately available *for the same purposes as the former appropriations*" sums described as "unexpended balances of former appropriations" and contains items:

> Palisades Interstate Park Fund.
> By Chapter 199 of the Laws of 1926 (re: $3899.28).
> * * * * *
> "State Park System Fund.
> By Chapter 16 of the Laws of 1926 (re: $11,912,850.58)".

[1] Appellants' Appendix, p. 41.
[2] Idem, p. 44.
[3] Idem, p. 53.

Chapter 602 of the Laws of 1924, Section 4, and Chapter 16 of the Laws of 1926, Section 2, Subdivision 2, had expressly prescribed that the moneys therein provided shall be expended and lands acquired by defendant, Board of Commissioners, under the provisions of Chapter 170 of the Laws of 1900, as amended.

Section 16[1] of Chapter 170 of the Laws of 1900, reenacted as Section 759[2] of the Conservation Law by Chapter 242 of the Laws of 1928, provides that the Commissioners of the Palisades Interstate Park *shall not acquire title to or enter into possession of any premises under condemnation until after an award has been paid to the owner or deposited with the county clerk and that such payment should operate to transfer the title to the said commissioners.*

When Chapter 602 of the Laws of 1924 was enacted and when the People of the State of New York ratified it at the general election of 1924 and when Chapter 16 of the Laws of 1926 and Chapter 75 of the Laws of 1928 were enacted, the law prescribed *only one method of compulsory taking of private property* by the Commissioners of the Palisades Interstate Park, namely, condemnation proceedings as specifically set forth in Chapter 170 of the Laws of 1900.

The appropriation was made to pay awards under the laws of 1900, 1924 and 1926. It specifically reappropriates for the same purposes moneys which the laws of 1924 and 1926 provided to pay awards in condemnation cases in the Palisades Interstate Park.

The attempted acquisition by the Commissioners of the Palisades Interstate Park of the premises owned by the plaintiffs on the contrary purported to be made under and by virtue of the new power granted by Section 761, (Deft's Ex. 1, R. 64).

---

[1]Appellants' Appendix, p. 19.
[2]Idem, p. 33.

A valid exercise of this power by the Commissioners would have caused the title to the land appropriated to pass from the owner to the People of the State.

> Section 59, subdivision 3, Conservation Law.
> *Kahlen* v. *State of New York*, 223 N. Y. 383.

In condemnation under the re-enacted provisions of Chapter 170 of the laws of 1900[1] "payment shall operate to transfer the title to the said Commissioners."

The use of any funds resulting from the sale of bonds authorized by Chapter 602 of the Laws of 1924 has never been authorized by the People for the acquisition of lands by appropriation by the Board of Commissioners of the Palisades Interstate Park. The moneys available under Chapter 16 of the Laws of 1926 could be expended only in the manner provided for in that particular Act and pursuant to and in compliance with the laws, namely, Chapter 170 of the Laws of 1900, which regulated at the time of referendum and appropriation the acquisition of the lands by the Palisades Interstate Park Commission. The People did not authorize nor has the Legislature ever attempted to appropriate money with which the Commission may acquire land in any way other than that prescribed by law at the time the fund for such acquisition was created.

Appellants are forced to argue that the addition of Section 761 to the Conservation Law by Chapter 242 of the Laws of 1928 was an "amendment" of the original Palisades Park Act (L., 1900, Ch. 170) because although repealed by the Act of 1928 its contents were substantially re-enacted by it (Appellants' Brief, p. 50).

The provisions of Chapter 242 of the Laws of 1928 expressly exclude any such construction. The reenacted

[1] §16, Appellants' Appendix, p. 19.

provisions of Chapter 170 of the Laws of 1900 are a part of Article XVI of the new law, as is Section 761.

Section 662 of the new law (printed in Appellant's Appendix, p. 27) is also part of Article XVI and it provides:

> "* * * but this provision shall not apply to such acquisitions made or to be made pursuant to Chapter sixteen of the laws of nineteen hundred and twenty six relating to expenditures of the proceeds of state bonds authorized by chapter six hundred and two of the laws of nineteen hundred and twenty four, *and such chapter shall not be affected or impaired by this article*".

Obviously if Chapter 16 of the Laws of 1926 is not affected or impaired by Article XVI of the new law the addition of Section 761 as a part of Article XVI will not affect or impair that portion of Chapter 16 of the Laws of 1926 which incorporates Chapter 170 of the Laws of 1900.

Admitting an amendment may be an addition to a statute another difficulty in which appellants find themselves is that this question is settled by the Court of Appeals against them as well as by the General Construction Law of the State (L., 1909, Ch. 27) which provides:

> "§ 80. References to repealed provisions. If any provision of a law be repealed and, in substance, re-enacted, a reference in any law to such repealed provision shall be deemed a reference to such re-enacted provision."

The General Construction Law applies to every statute unless a contrary intention is shown.

Matter of Bronson, 150 N. Y. 1.

When therefore it is provided in Chapter 602 of the Laws of 1924[1] and in Chapter 16 of the Laws of 1926[2] that "the moneys for the development, improvement and extension of the Palisades Interstate park shall be expended and the lands shall be acquired by the commissioners of the Palisades Interstate park under the provisions of chapter one hundred and seventy of the laws of nineteen hundred, as amended" the effect of section 80 of the General Construction Law was to add:

> "and if chapter one hundred and seventy of the laws of nineteen hundred, as amended, be repealed and in substance re-enacted, the moneys shall be expended and the lands acquired under such re-enacted provision."

Section 761 is not a re-enacted provision and cannot therefore be incorporated in the acts of 1924 and 1926.

Bohmer v. *Haffen*, 35 App. Div. 381, 386; aff'd 161 N. Y. 390, 405 is cited as authority for the proposition that "an amendment may be an addition to as well as an enlargement of the statute existing at the time of such amendment" (Appellants' Brief, p. 50). In that case the question was whether section 16, article III of the state constitution, providing that "no private or local bills, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title," had been violated by chapter 340 of the laws of 1892, entitled "An act to amend Chapter three hundred and sixty one of the laws of eighteen hundred and sixty three, entitled an act to authorize the construction of a railway and tracks in the towns of West Farms and Morrisania, and all acts amendatory thereof."

---

[1]Appellants' Appendix, p. 38.
[2]Idem, p. 44.

Section 6 of the amendatory act gave a new power of consolidation.

The Court of Appeals, with one dissent, was of opinion:

> "Anything germane to the general subject of building and operating a railroad might have been included in the original act of 1863, provided always it was not prohibited by some constitutional provision. And that which might have been included in the original act without offending the constitutional provision under consideration, may be incorporated into it subsequently by amendment without change of title."

The opinion moreover calls attention to the title of the act of 1892, quoted above, and says:

> "Its title purports to effect a single object, namely, the amendment of a particular statute, and necessarily calls attention to the fact that the purpose is to add to, or deduct from, the authority granted by it. In that respect at least the usual method of amendatory legislation has been followed, and, because it authorizes something not permitted by the original act, it does not necessarily add to the number of subjects embraced in the legislation" (p. 405).

Chapter 242 of the laws of 1928[1] on the contrary is entitled "An Act to *amend the conservation law*, generally, and to conform the same to the state departments law, and *repealing* certain provisions of article eight of the state departments law, and *certain other statutes.*" (Italics supplied).

That this is an amendment of the conservation law is emphasized throughout, the portion dealing with the

[1]Appellants' Appendix, p. 21.

new division of parks in which this commission is included being typical.[1] It reads:

> "§41. Such chapter is hereby amended by inserting therein a new article, to follow article fifteen, to be article sixteen, to read as follows:
>
> ARTICLE XVI.
>
> DIVISION OF PARKS.
>
> Part 1. . . . . .
>
> . . . . . .
>
> . . . . . .
>
> 9 Commissioners of the Palisades Interstate Park (§§745-760)."[2]

The only mention of chapter one hundred and seventy of the laws of nineteen hundred occurs in the last section:

> "§50.[3] The following laws are hereby repealed together with any laws amendatory thereof or supplementary thereto:
>
> . . . . . .
>
> chapter one hundred and seventy of the laws of nineteen hundred; . . ."

The legislature had no idea or intention of amending the original Palisades Park act. If it survives at all it survives as amended prior to its repeal and substantial reenactment. Chapter 242 of 1928 expressly repeals the original Palisades Park act and then *amends the conservation law "by inserting therein a new article"* containing the provisions of the original act and an added provision.

---

[1] Appellants' Appendix, p. 27.
[2] Laws of New York, 1928, p. 654.
[3] Appellants' Appendix, p. 35.

When a specific statute is incorporated into another statute as Chapter 170 of the Laws of 1900 was incorporated in Chapter 602 of the Laws of 1924 and in Chapter 16 of the Laws of 1926; in such a case what is incorporated is strictly the law at the time of the incorporation and the *incorporating statute is not deemed changed in correspondence with amendments to the incorporated act.*

Carling v. *Purcell,* 3 Misc. 55, 56.
Knapp v. *The City of Brooklyn,* 97 N. Y. 520.
Matter of Alter'g. etc. Main St., Sing Sing, 98 N. Y. 454.

In the case last cited the charter of the village of Sing Sing (L. 1859, Ch. 439) provided that in proceedings to lay out, open and widen streets the trustees shall conform to the provisions of Article 4, Title 1, Chapter 16, Part 1 of the Revised Statutes being the General Highway Law.

In 1875 the latter statute was amended (L. 1875, ch. 431) so as to change the method of selecting jurors.

In 1880 the legislature enacted Chapter 568 entitled "An act to consolidate, amend and revise the charter of the village of Sing Sing." Section 38 of this act was a re-enactment of the provisions of the prior act which had incorporated the General Highway Law contained in the Revised Statutes.

On certiorari to review street opening proceedings it was objected that jurors had not been drawn according to the amended General Highway Law.

The Court of Appeals said:

> "Except for the re-enactment of the section in the charter of 1880, it would be plain that the change in the manner of selecting jurors under the general statute, made by Chapter 431 of the Laws

of 1875, amending the Revised Statutes, and providing that jurors should be drawn by the town clerk, etc., would not apply to the village of Sing Sing. The charter of 1859, which makes the provisions of the Revised Statutes, in reference to the laying out, etc., of highways, applicable to the laying out, widening, etc. of streets in the village, necessarily referred to the provisions of the General Highway Act, then existing. A subsequent amendment of the general law would not operate *ipso facto* as an amendment of the charter. If the act of 1859, in place of incorporating by reference the provisions of the Revised Statutes into that act, had re-enacted those provisions in full, it could not be claimed that subsequent amendments of the general law would change the charter, and the case is not changed by the mere form of the enactment."

In *American Bank* v. *Goss*, 204 App. Div. 759, 760, it is written:

"It is a well-settled rule of interpretation of statutes that where a statute expressly or by necessary implication adopts another, that statute must be deemed to have incorporated the statute adopted *ipsissimis verbis*, and future additions to or modifications of the latter are not included in the adoption, unless a contrary intention is clearly manifested. This rule of law was cited in *Carling* v. *Purcell* (3 Misc. Rep. 55) and authorities cited. In Sutherland on Statutory Construction (Vol. 2, p. 787) the law is stated to be as follows: 'Where one statute adopts the principal provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute. * * * Such adoption takes the statute as it exists at the time of adoption and does not

include subsequent additions or modifications of the statute so taken, unless it does so by expressed intent.' (See, also, Endlich Interp. Stat. § 492; *Knapp* v. *City of Brooklyn*, 97 N. Y. 520; *Matter of Main Street, Sing Sing*, 98 id. 454; *People* v. *Damron*, 160 App. Div. 424.) In fact, this rule of interpretation is so well recognized that I have been able to find no cases whatever in which an exception has been made thereto."

It is therefore the law of New York, aside from the provisions of the law itself, that when Chapter 242 of the Laws of 1928 repealed and reenacted Chapter 170 of the Laws of 1900 the reference to it in Chapter 602 of the Laws of 1924 and in Chapter 16 of the Laws of 1926 remained a reference to it as it stood when the incorporating statutes were enacted.

People ex rel Garvey v. *Prendergast*, 148 App. Div. 129, cited by appellants (p. 51) does not deal with amendments.

In *Harris* v. *White*, 81 N. Y. 532, the reference in the Revised Statutes was not to a particular statute but in general terms to all the special laws on the subject and the intention of the legislature plain that the incorporating statute being a *general* law should incorporate subsequent *special* acts.

Board of Excise v. *Curley*, 9 Abb. N. C. 100; 69 N. Y. 608, held that chapter 327 of the laws of 1874 which provided that the provisions of chapter 628 of the laws of 1857 "shall be taken and construed as part of this act" referred to the act of 1857 as amended *at the time the incorporating statute was enacted.*

Mundy v. *Excise Commissioners of New York*, 9 Abb. N. C. 117, deals with the same matter of amendments before the passage of the incorporating statute.

The result is that no portion of the bond issue moneys are available for a taking by appropriation but must be expended and lands acquired by condemnation as provided in the Palisades Park Act as it existed on February 24, 1926 when chapter 16 of the laws of 1926 became a law.

Bond moneys, however, are not available because the appropriation under chapter 16 of the laws of 1926 lapsed and was not lawfully reappropriated.

Chapter 16 of the laws of 1926[1] separately appropriated and made available the sum of $3,500,000 out of the bond issue for acquisition of land by this commission *by condemnation.*

Section 21, article III of the state Constitution[2] forbade payment of the money out of the state treasury unless made within two years after the passage of the appropriation act which became a law February 24, 1926.[3]

Two years elapsed and an unexpended balance aggregating $11,912,850.58 remained out of the separate appropriations made in 1926.

Chapter 75 of the laws of 1928 became a law February 17, 1928.[4]

---

[1]Appellants' Appendix, p. 41.
[2]Idem, p. 4.
[3]Idem, p. 41.
[4]Idem, p. 53.

Part V[1] provides:

PART V.

"SECTION 5. The following sums, or so much thereof as may be necessary, being the unexpended balances of former appropriations, are hereby reappropriated and made immediately available *for the same purposes* as the former appropriations."

* * * * * *

State Park System Fund.
By Chapter 16 of the laws of 1926 (re: $11,912,850.58)."

Chapter 16 of the laws of 1926 created no State Park System Fund but on the contrary made fifteen separate appropriations for as many diverse purposes.[2]

An attempt to reappropriate fifteen separate appropriations as one Fund does not comply with Section 21, Article III of the State Constitution[3] which requires a reappropriation act must (1) specify the sum appropriated, (2) specify the object to which it is to be applied and (3) must not refer to any other law to fix the sum.

In *People ex rel. Hopkins* v. *B'd Sup'rs Kings Co.*, 52 N. Y. 556, the Court of Appeals held Chapter 700 of the laws of 1872 unconstitutional because, like Chapter 602 of the Laws of 1924, it enumerated a number of separate appropriations and then in Section 2 assumed to authorize a debt "for the single object of raising the money to pay the appropriation herein named". In Section 5 it provided that "this act shall be submitted to the people at the next general election to be held in this state".

---

[1]Appellants' Appendix, p. 53.
[2]Idem, pp. 41-44.
[3]Idem, p. 4.

The Court of Appeals held the act unconstitutional as violative of the provisions of Section 12 of Article VII of the State Constitution now contained in Section 4 of Article VII,[1] providing that "no law authorizing a debt to be contracted can take effect until assented to by the people, and but one law for that purpose can be submitted at the same general election or within three months of its passage, and the debt to be created must be for some single work or object to be distinctly specified in the law."

Allen, J., wrote upon this subject in part as follows:

> "The appropriations are in fact many, and their objects many and diverse, and they cannot be reduced to one, and the objects and works made a unit by the mere dash of a pen or the construction of a sentence. Neither is the object of the debt made single by declaring it to be for the payment of the aggregate of all the sums of money appropriated by the act.
>
> "The 'work or object' contemplated by the Constitution is the public work or object to be accomplished by the expenditure of the money to be borrowed. If an appropriation had been made for a single work or object, a debt might perhaps be created for the payment of that one appropriation, upon the principle that that is certain which can be made certain; and by reference to the law making the appropriation the object or work for which the debt was to be contracted would be ascertained. Still, this would not be the best or a desirable form of legislation, and would be of doubtful validity.
>
> "The design of the Constitution was that the specific purpose of the debt should be specified in the act, that the legislature and the people, who were to vote upon it, could read it there; and a departure from the letter of the provision may frustrate its intent. It is true, here the appropriations and the authority for the debt are in the same act; so that the law is not obnoxious to the objec-

[1] Appellants' Appendix, p. 5 and supra p. 14, in full.

tion that would exist if they were in separate acts.[1] But the difficulty remains that, notwithstanding the form of the second section, the 'work or object' for which the debt is authorized is not a single work or object; neither are the objects defined or capable of being ascertained from the act itself."

* * * * * *

"It is not difficult, and ought not to be regarded as an unreasonable or onerous requirement, to state the 'object' to which an appropriation is to be applied, or the 'single work or object' for which it is proposed to create a State debt or the 'object' for which a tax is deemed necessary, and to which it is to be applied."

And to illustrate the vice of an act drawn as was the one under consideration the learned Judge wrote:

"The act appropriates, in different sums varying from $2,500 to over $4,000,000, respectively, an aggregate amount of over $6,000,000; but each appropriation is for a different work or object. The Constitution would be of little value as a restraint upon the debt creating power if it could be evaded by bringing together in one law distinct appropriations of different amounts, for a canal in one part of the State, in aid of a railroad in another, building a lunatic asylum in another, and a State prison and a normal school building in still other parts; and then a debt could be authorized for the single object of raising the money to pay the 'said appropriation'."

All that was said in this opinion applies to the acts of 1924 and 1926 and the attempted reappropriation in Chapter 75, Part V, page 224 of the Laws of 1928. Chapter 602 of the Laws of 1924 contains nine distinct appropriations of different amounts for different purposes in different parts of the state. Chapter 16 of the Laws of 1926 attempts to make, out of moneys realized from

[1] As in the present case.

the sale of bonds issued in pursuance of the provisions of Chapter 602 of the Laws of 1924, fifteen distinct appropriations of different amounts for different purposes in different portions of the state.

In *Half Moon Bridge Co.* vs. *Canal Board,* 91 Misc. 600, the Court held that Chapter 801 of the Laws of 1913 amending the Barge Canal Act, by which private bridges and their franchises were made subject to condemnation for the barge canal was not within the power of the Legislature to enact, being in direct conflict with Section 4, Article VII, of the Constitution, pursuant to which the Barge Canal Act became a law.

There the plaintiff owned and operated a toll bridge across a section of the Mohawk River which was being canalized for the barge canal. The canal board attempted to appropriate a part of plaintiff's lands at each end of the bridge which, with the constructions in the river, involved the destruction of the bridge. Plaintiff sued to enjoin the destruction of the bridge except on condition that the State build a new bridge for plaintiffs on the site of the old one. The canal board denied the liability of the State to restore the bridge and asserted a right to destroy it without compensation or substitution of another bridge. On the pleadings as originally made the action was tried and the parties submitted the case for decision. Before a decision was reached by the trial court the canal board procured the passage of Chapter 801 of the Laws of 1913 amending the barge canal act so that private bridges and their franchises were made subject to condemnation for barge canal purposes, and under the amending act took necessary proceedings to condemn plaintiff's bridge and procured an order permitting the service of a supplemental answer. On the pleadings as so amended the parties submitted the case on the evidence originally taken before the filing of the supplemental answer with the

further proof by the canal board that the bridge had been condemned by the State under the amended act. Mr. Justice Borst wrote:

> "The sole question left for determination and now presented is, was the amended act under which the bridge was condemned within the power of the legislature to enact? If it was, plaintiff must go to the Court of Claims to secure its damages, and judgment in this action must go to the defendants. As the case stood when the parties first submitted it to the trial court, the plaintiff was entitled to the judgment it was demanding. The Barge Canal Act, as it then was, provided: 'New bridges shall be built over the canal to take the place of existing bridges wherever required or rendered necessary by the new location of the canal.'
>
> It has been held that, under this provision of the statute, the state could not condemn the bridge but must rebuild it. *Halfmoon Bridge Co.* v. *Acme Construction Co.*, 157 App. Div., 183; *Halfmoon Bridge Co.* v. *Acme Construction Co.*, 163 id. 76; reversed on other grounds, 213 N. Y. 160."

After setting forth the provisions of Section 4, Article VII, of the State constitution Mr. Justice Borst continued:

> "Before the Barge Canal Act could become a law its passage was required with certain formalities as we have seen, not prescribed for the passage of ordinary enactments by the legislature, and then went to the people for their approval. If it could be amended by the legislature, except in the manner prescribed by the Constitution, the formality of its passage is not apparent. If the act could be changed or nullified at the will of the legislative body, its approval by the people would seem to have been without reason or necessity. If it was contemplated that it might be amended generally by the legislature, then the provision for the specified amendment contained in the Constitution is without force or effect.

> "It thus appears that the amendment to the Barge Canal Act sought to be upheld in this action is in direct conflict with the plain provisions of the Constitution. The vote of approval by the people was required and taken with the understanding that the act could only be modified in the two ways specified by the Constitution*, and it was not so modified. If that expression of approval by the people upon an act is to stand for anything more than a mere formality, the amendatory act in question must fail of sanction by the court. The legislature was therefore without authority to pass the amendatory act, and the proceeding taken under it to condemn plaintiff's bridge and franchises for the uses of the state was without authority and must fail."

From this decision the Attorney General took no appeal.

The law therefore is that because the Barge Canal Law, approved by popular vote, provided that another bridge should be built to replace the old one it was beyond the competence of the Legislature to enact that the old bridge property might be taken by eminent domain. The converse of the proposition is presented in the present case. Chapter 602 of the Laws of 1924 approved by the electorate under the same constitutional provision which required approval of the Barge Canal Law provides that property must be acquired by the defendant, Board of Commissioners, according to the provisions of Chapter 170 of the Laws of 1900 as amended, namely, condemnation. The defendant Board of Commissioners have sought to appropriate leaving plaintiffs an imaginary remedy in the Court of Claims.

Therefore the Legislature, being expressly limited by Section 4, Chapter 602 of the Laws of 1924, and the vote

---

* Repeal, if no debt has been contracted, or forbid contracting any further debt. Const. Art. VII, §4.

of the People approving the same, had no power to authorize the Palisades Interstate Park Commissioners to acquire, by appropriation, lands compensation for the taking of which would have to be paid out of the bonds approved by the Referendum of 1924; and the Board of Commissioners of the Palisades Interstate Park have no power and authority to expend moneys provided by the Acts of 1924 and 1926 in any manner other than that authorized by Chapter 170 of Laws of 1900, as amended at the time.

Assuming that Chapter 602 of the Laws of 1924 and Chapter 16 of the Laws of 1926 do not offend the provisions of the Constitution as construed in *People ex rel. Hopkins* v. *B'd Sup'rs Kings Co.*, and *Half Moon Bridge* v. *Canal Board, supra,* and that all that can be said of them is in the words of Allen, J., that they are not the best or a desirable form of legislation, when we come to the item "State Park System Fund" in Chapter 75, Part V, page 224 of the Laws of 1928 and apply to it this decision of the Court of Appeals its violation of Section 21 of Article III of the Constitution is apparent for it does exactly what the Court of Appeals forbade in the case which we have cited by reducing appropriations that are in fact many, with objects many and diverse, to one by the construction of a sentence "State Park System Fund. By Chapter 16 of the Laws of 1926 (re: $11,912,850.58)." The object of the debt is not made single by declaring it to be for the payment of the aggregate of all the sums of money attempted to be reappropriated.

How can anyone tell how much of the eleven million shall go to any particular project without reference to another law to fix the sum?

Chapter 75 of the Laws of 1928 altogether fails to specify the purpose for which the sum of $11,912,850.58 is appropriated and such purpose can be ascertained only

by reference to Chapter 16 of the Laws of 1926. By reason of such noncompliance with the imperative requirements of the Constitution, the appropriation Act of 1928, Chapter 75, Part V, page 224 is void, and of no effect, and the amount designated therein as the "State Park System Fund" is unavailable.

There being no valid law continuing or reviving the appropriation for state park purposes, and the sum provided for by the Act of 1924 and appropriated by the Act of 1926 not being paid or expended within two years next after the passage of the appropriation Act (1926), there is no sum designated for expenditure by the Commissioners for the purpose of acquiring lands for the extension of the Palisades Interstate Park.

The taking of plaintiffs' property under these circumstances is obnoxious to the Fourteenth Amendment as well as the Constitution of the State of New York, Section 6, Article 1 and in direct violation thereof, being a taking of private property for public use without just compensation, or making provision for just compensation.

Moreover, the Court is bound by the decisions of the state courts cited above to hold that any amount reappropriated for this Commission must be spent pursuant to the provisions of Chapter 16 of the laws of 1926. Chapter 75 of the laws of 1928 became a law on February 17, 1928, while chapter 242 of the laws of 1928 upon which appellants rely did not become a law until March 5, 1928.[1] *It is impossible to find that the appropriation act of February 17, 1928 specified as the object to which the sum appropriated is to be applied a method of acquiring land which did not come into existence until March 5, 1928.*

Appellants state (Brief, p. 53) that our sole objection to chapter 75 of the laws of 1928 is that it fails "to specify the object to which the sum appropriated is to be

[1]Appellants' Appendix, p. 21.

applied". We object also that in order to fix the sums appropriated it is necessary to refer to chapter 16 of the laws of 1926 because it attempts to reappropriate the unexpended balances of fifteen separate appropriations *and then to the state comptroller's books to find how much balance each of the fifteen appropriations carried on February 17, 1928.*

It is quite true that chapter 602 of the laws of 1924 is entitled "An Act making provision for issuing bonds * * * in order to create a comprehensive and unified state park system * * *", and the comptroller may have opened one control account in his books against which separate items for the various separate appropriations were charged. It is quite another matter when the legislature comes to reappropriate the sum of the unexpended balances in one lump sum.

In *People ex rel. Hopkins* v. *Bd. Suprs. Kings County*, 52 N. Y. 556, an act was passed appropriating $4,000,000 to meet "the present acknowledged deficiency * * * according to the report of the late comptroller, transmitted to the legislature January 2d, 1872."

It was held these words did not sufficiently state the amount *or* object of the appropriation, the Court saying:

> "The comptroller's report, if admissible, may distinctly specify the duties and liabilities, 'acknowledged and estimated', to whom payable, and for what contracted, but this is not a compliance with the important requirement of the Constitution, that the object as well as the amount of the appropriation shall be distinctly specified in the act" (p. 561).

Here to ascertain how much each of the fifteen beneficiaries are to receive it is necessary to consult books in the office of the comptroller. Just as in the *Hopkins Case* (p. 560) it is said "It is impossible to divine from the law of 1872 which of the many appropriations in the acts referred to were deficient, as to which of the several objects named in these acts the appropriations were to be

applied" so here it is impossible to divine which of the several appropriations had a credit balance or to which objects the appropriation was to be applied.

It is quite true, as stated by appellants (p. 54), that a referendum act is subject to the identical requirement that it distinctly specify its single object (Section 4, Article VII, Constitution).[1] We believe the referendum act, chapter 602 of the laws of 1924 also violated the constitution in this respect but such a ruling is not necessary to sustain the decree.

> *People ex rel. Hopkins* v. *Bd. Suprs. Kings County,* 52 N. Y. 556, 560.

(3)

General funds of the State (p. 10).

Appellants state "the approval of the Conservation Commissioner * * * brought all the resources of the State within that pledge of its general credit which section 59 of the Conservation Law gives" (Appellants' Brief, p. 11).

Section 662 of the Conservation Law, under which it is plain from the preceding statement in the brief (p. 10) such approval was given and which is the only provision in the law for such approval, has this significant provision:

> "Real property shall not hereafter be acquired with state moneys by any such commission, commissioners, society, board, trustees, corporation, association or authority by condemnation or appropriation, except with the approval of the conservation commissioner; but this provision shall not apply to such acquisitions made or to be made pursuant to chapter sixteen of the laws of nineteen hundred and twenty-six relating to expenditures of the proceeds of state bonds authorized by chapter six hundred and two of the laws of nineteen hundred and twenty-four, and such chapter shall

[1] Appellants' Appendix, p. 5.

not be affected or impaired by this article". (Appellants' Appendix, p. 27).

When the Commission after its meeting obtained a new approval from the Governor, acting this time under Section 59, and an approval of the Conservation Commissioner acting under Section 662 of the Conservation Law and, instead of commencing a condemnation proceeding, served on appellees a notice of appropriation for which the new approvals were necessary, it discarded the allocation of $600,000 it had obtained on September 29, 1929 and, unless the extraordinary power attributed to the Conservation Commissioner to bring "all the resources of the State into pledge" exists, no means of compensation whatever, even promissory, was provided.

The approval of the Conservation Commissioner (R., 73-74) was a part of the notice (R., 74) served on appellees, the affidavit of White stating "the appropriation papers" (of which it is a part) "were filed in the office of the Secretary of State and on that day they were served upon the Sparkill Realty Corporation and the Standard Trap Rock Corporation, together with the notice that the lands were appropriated" (R., 61, 62).

It therefore sufficiently appears that the Commission having started to take the property lawfully in condemnation for some reason undisclosed changed to a taking on credit.

The lack of power to pledge the state credit and the insufficiency of such a pledge if it could be made have been shown.

In the present case the record is not voluminous; there are no contracts between the parties and the relevant statutes are not intricate.

Decisions of the Court of Appeals of New York authoritatively and consistently determine all the issues of state law and lay them down one by one as the foundation stones upon which, under the decisions both of this Court and the courts of New York, appellees base their right to

protection under the Fourteenth Amendment against administrative lawlessness.

There are no preliminary questions of state law which have not come before the state courts and been decided in favor of these appellees so that the rule in *Gilchrist* v. *Interborough Co.*, 279 U. S. 159, 207, and other cases cited by appellants does not in any sense apply.

The construction or application of the Fourteenth Amendment to the condition created by these decisions in one way will defeat appellees and in another sustain them thus bringing the case within the rule in *New Orleans* v. *Benjamin*, 153 U. S. 411, 430, and similar cases.

POINT IV.

Being without the means of enforcing payment of compensation appellees are injured and may raise the questions presented.

It is pretense for appellants to argue appellees would suffer no injury by having their compensation paid out of the bond issue moneys (Appellants' Brief, p. 57). The question is whether having been deprived of their property there is any means of enforcing payment out of the bond moneys. If there is no means then appellees have been so deprived without due process and are within the exact class with respect to whom the act of deprivation is unconstitutional.

We contend upon established law in New York that there are no funds in the state treasury out of which payment of just compensation can be coerced. If $600,000 were available then such sum by reason of its insufficiency to pay the award reasonably anticipated for land and improvements, the latter alone costing $1,000,000, does not furnish the certainty of just compensation guaranteed by the Fourteenth Amendment.

The case necessarily involves a question arising under the constitution of the United States and cannot be decided without deciding that question because it must be decided whether and in what amount the Fourteenth Amendment requires an antecedent appropriation of funds before title vests in eminent domain.

As stated in the opinion of the District Court:

> "The jurisdiction of this Court is invoked upon the claim that the plaintiffs property is being taken without due process in violation of the 14th amendment of the Federal Constitution." (R., 90).

The suit is brought to restrain the defendants from enforcing or attempting to enforce the provisions of an act of the Legislature and a notice, description or certificate against appellees or from withholding possession of their property by virtue of such notice and to have it adjudged that the statutes under which defendants assume to act are unconstitutional if construed as appellants construe them.

The bill therefore necessarily and properly alleges the basis of the unconstitutionality and the case is one in which a correct decision depends on the construction of the Fourteenth Amendment since the right set up by appellants may be defeated by one construction and sustained by the opposite construction.

Osborn v. *U. S. Bank,* 9 Wheat, 738.

It is therefore a case arising under the constitution and may be brought in the District Court of the United States.

Railroad Co. v. *Mississippi,* 102 U. S. 96.

POINT V.

All facts essential to the presentation of the federal question appear by the allegations of the bill of complaint.

The absence of an antecedent appropriation and the value of the property are shown by the bill of complaint.

1a. Appellants object (p. 60) that the bill contains a general allegation that the real property and the leasehold are of the value at present in excess of $3,000,000 (R., 8) citing Lewis on Eminent Domain [3d ed.], p. 1253; Matter of William and Anthony Streets, 19 Wend. 678.

The allegation is quite proper and therefore sufficient because as stated by Mr. Lewis at the place appellants cite him:

> "When there are different interests or estates in the property, the proper course is to ascertain the entire compensation as though the property belonged to one person and then apportion this sum among the different parties according to their respective rights."
>
> Lewis Eminent Domain [3d Ed.] §716, p. 1253.

There is no attempt to enhance the value by a distribution of the title or estate among the owners of different interests. The pleader has followed the rule laid down by Mr. Lewis and supported by his citations and alleged the value as if the property belonged to one person.

(b) Under the rule stated in *Merritt & Chapman Co.* v. *U. S.*, 274 U. S. 611, 612 that a general statement shall be limited by a specific, appellants assert the figure of $3,000,000 must be taken "as including the estimated future profits and value of the quarry in operation."

Appellees' bill adds nothing for expense excluded by the decisions in *Banner Milling Co.* v. *State*, 240 N. Y. 533, or *Joslin* v. *Providence*, 262 U. S. 668, 675, where loss

from compulsory removal of a business to another location was considered or for destruction of a business excluded in *Mitchell* v. *United States,* 267 U. S. 341.

The property taken is a quarry upon which appellees have with the knowledge and encouragement of this Commission, which might at any time if its contentions are sound have stopped them, erected a plant costing a million dollars. The quarry is developed and according to appellants' own statement actual excavation was about to begin operations (Appellants' Brief, p. 6).

N. Y. C. R. R. Co. v. *Maloney,* 234 N. Y. 208, is authority that the use an owner might make of clay deposits in the next forty years by erection and equipment of buildings is immaterial where "so far as the record discloses the land had not been devoted to any particular use" (p. 217). Yet the Court recognized that

> "As bearing upon the question of market value, the owner is privileged to offer evidence as to deposits of certain materials upon the land which might tend to enhance the market value beyond the purposes for which the same was used. * * * The question in such a case is not merely whether the property is peculiarly adopted for the special use claimed for it, even with deposits upon it such as have been enumerated, but whether or not purchasers can be found who would pay more for it because of the adaptability to the use to which the same might be applied."

Here is a property actually developed on appellants' own statement and the allegation in paragraph Seventh of the bill (R., 4) is proper under the *Maloney* case, *supra.* This and the completion of a plant costing one million dollars (R., 5, 6) certainly is evidence that "a purchaser can be found who would pay more for it because of the adaptability to the use to which the same" is ready to be applied.

Orleans County Quarry Co. v. *State,* 172 App. Div. 863, 865-6, cited by appellants on the measure of damages discloses a very different situation to the present. Like all

such cases it is a decision upon the particular facts which were that quarries in the locality sold *uniformly* on an average basis at not more than $1000 per acre, the claimants' own accounts showed cost not to be uniform and that some quarries were profitable and others nearby were not, the Court finding that evidently in this locality the margin of profit in working a quarry is small or doubtful" (p. 865). Here the affidavit of White concedes other quarries on the Hudson "were earning large profits" (R., 58). The award was at the rate of over $10,000 per acre (p. 864) and the Court quite reasonably found the Board had not paid attention enough to the other circumstances bearing directly upon the value of the property and too much to expert evidence and estimates of profits (p. 866).

Yet Mr. Justice Kellogg wrote:

> "Undoubtedly the proof as to the quantity and quality of the stone was important, and the cost of getting it out ready for market; but these are elements to be considered with others in determining the value of the quarry" (p. 865).

If appellants may use appellees' affidavits to construe the bill (note, p. 60) so may we and so doing we find:

A plant modern in all respects (R., 48) ready for operation within 18 miles of New York, with a quarry the physical nature of which reduces cost and makes possible quarrying from a single bench (R., 44, 47, 50), costs including overheads carefully computed by competent witnesses (R., 37, 50, 51) and an assured market (R., 37) at a profit (R., 44).

(c) The bill of complaint includes nothing for personal property not a part of the realty. In that portion to which appellants refer in their brief (R., 6-7) there is the allegation that Standard Trap Rock Corporation, after the Commission's statement it was not going to condemn, contracted for a plant and equipment specially designed and not adaptable for use elsewhere which would have been ready for operation in December 1928 (R., 6)

and that certain personal property was converted by Commissioners to their own use (R., 7). Exhibit F to the bill shows that the only personal property not a part of the plant and therefor of the realty are an automobile truck and office furniture and fixtures (R., 33). The affidavit of White (R., 62) further contradicts appellants' brief by showing whatever personal property there was removed from the premises at the time belonged to contractors and not appellees.

People vs. *Johnson & Co.*, 219 App. Div. 285; affd. 245 N. Y. 627; c. d. 275 U. S. 571 recognizes that the value of fixtures is considered in estimating the total value of property appropriated by the state and for the enhancement of value due to fixtures in a factory the owner should be compensated (219 App. Div. 288).

(d) Appellees agree the bill does not allege the value of personal property on the premises *at the time* of appropriation.

The bill therefore shows a fee and leasehold, taken "as though the property belonged to one person" (Lewis, Eminent Domain [3d Ed.] §716, *supra*) of a total value of more than $3,000,000.

2. While it is admitted that $3,500,000 was appropriated for the Palisades Interstate Park in 1926 it is contended and the Court below has decided that no part of this sum was ever available for the taking of this property except by condemnation (R., 93).

Appellants are as disingenuous in stating "the bill of complaint does not allege that any part of the $3,500,000 had been expended before the entry and appropriation" (p. 62) as is the affidavit of White (R., 79) in alleging, *on information and belief,* although president, that his board had on hand moneys, securities and other properties of a value in excess of $500,000. If this were the fact only an exact statement would suffice to make the statement material.

There is throughout appellants' brief an effort to create the impression that $3,500,000 is available to pay

for this property. The truth is stated once by appellants (p. 10) where it is conceded that before any of the $3,500,000 can be spent it must be allocated to a particular project by approval of the State Council of Parks, Governor and legislature Chairmen and that only $600,000 was so allocated.

3. The Bill merely alleges the fact that certain state officers went through the acts prescribed for an allocation (par. Fourteenth, R., 6).

Value having been alleged in the bill at $3,000,000 necessarily $500,000 or $600,000 is not an adequate provision. Appellants now call it merely a tentative preliminary estimate. Elsewhere, perhaps unconsciously and certainly inconsistently, they have conceded it is all they have because it is all that has been allocated under Chapter 16 of the Laws of 1926.

4. The invalidity of Chapter 75, Part V, Laws of 1928 is determined by decisions of the Court of Appeals whatever the appellants bring themselves to say to the contrary.

We are not referred to the portion of the Bill of Complaint which "shows that the Attorney General * * * joins with all the other appellants in asserting the validity of the entry and appropriation" (p. 64). He is in fact joined as defendant because Section 68 of the Executive Law of the State authorizes his appearance in cases involving the constitutionality of an act of the legislature (R., 87).

He filed no answering affidavit and with the Conservation Commissioner made a separate motion to dismiss (R., 80) joining later in this appeal (R., 97).

The decision in *County of Albany* vs. *Hooker,* 204 N. Y. 1, 19 does not make the Attorney General the only person who can question the legality of an appropriation act. The late Chief Judge, to whose concurring opinion appellants refer, merely says an action to restrain illegal expenditures of state moneys can be brought by the people of the state alone.

Under Section 59, sub. 7 of the Conservation Law[1] the comptroller must issue his warrant and the state treasurer honor it. The Constitution forbids these officers from so doing whatever the position of the Attorney General in this suit and certainly there is nothing in what the late Chief Judge Cullen ever wrote to discourage a very strict obedience of the constitution.

5. The Bill of Complaint alleges:

> "No sum whatever has been appropriated for the acquisition of plaintiffs' property by entry and appropriation" (R. 7).

It is then alleged that its value greatly exceeds an amount invalidly appropriated (R., 8).

The affidavit of White after stating his belief "that value of the property, as such, is not an issue in this litigation" (R., 62) made an indefinite statement that the Commissioners "came to the conclusion" that the property was worth less than $600,000 and "thereupon sought and obtained an allocation from the bond issue moneys of $600,000" (see Exhibit G attached to the plaintiff's moving papers) (R., 63).

Apparently the argument in the District Court led affiant White to a different conclusion and value being an issue he made another affidavit (R., 78). This was his opportunity to tell the Court exactly what the Commission, of which he has been a member since its inception and president since 1921, has at its disposal. Although in his own words "thoroughly acquainted with the history and activities of the Commission" (R., 58) he is only able to say the Commission "on October 11, 1928 * * * had on hand * * * moneys, securities and other properties * * * which I am informed and believe were of a value in excess of $500,000."

Such candor and complete disclosure did not affect the result below.

---

[1]Appellants' Appendix, pp. 26, 27.

Appellants relied entirely in the first instance upon a pledge of state credit. They now seek to add other excuses equally ineffective.

POINT VI.

Public bodies will be enjoined from illegal acts done under color of right which cause irreparable injury to the property rights of individuals.

The position of the appellants is that the uniformed police of the Commission may oust the owner of land and compel him to bring an action of ejectment against their superiors.

The title of Sparkhill Realty Corporation on October 11, 1928 is conceded as well as the lease to Standard Trap Rock Corporation, its possession and the extensive preparations of the latter and the fact that one month before appropriation the latter was about ready to commence operations (Appellants' Brief, p. 6).

The illegality of the Commission's acts has been shown in the preceding points.

The affidavit of White (R., 61) states that before the appropriation of the property efforts were renewed to agree with the owner and conversations were had between counsel. Such is the fact. Negotiations were renewed in August 1928 after, as is undenied, the Commission had stimulated the Land Board to its unlawful interference with dredging as a preliminary to such renewal (R., 40).

On September 29, 1928 while these negotiations were still pending the Commission sought and obtained approval of estimates and maps by the State Council of Parks (Exhibit B to Bill of Complaint, R., 34). The approval recites the project was also submitted to the Governor and legislative Chairmen and had received their approval.

On October 8, 1928 the original approval was signed by the Director of the budget and filed with the State Comptroller (R., 55).

All this took place before the Commission met on October 9, 1928 and resolved to take the property by appropriation and entry (R., 61, 64).

When the Commission met everything was set for condemnation "under the provisions of chapter one hundred and seventy of the laws of nineteen hundred, as amended". The documents before the Court show the steps taken were "pursuant to the provisions of section 4 of chapter 16 of the laws of 1926" (R., 34).

Then the Commission met and adopted another method of taking by resolution (R., 64):

> "Resolved, that pursuant to the provisions of Chapter 242 of the laws of 1928 and the other applicable provisions of the laws of the State of New York, the Commissioners of the Palisades Interstate Park enters upon, takes possession of and appropriates, in the name of the People of the State of New York".

This method of taking required a separate approval of the Governor under Section 59 the Conservation Law[1] his former approval being for condemnation under Section 4 of Chapter 16 of the laws of 1926.[2]

So on October 10, 1928, the day after the Commission met, a second approval of the Governor, this time pursuant to Section 59, was obtained, (R., 72) and on the same day that of the Conservation Commissioner (R., 73), expressly excluded as we have shown by Section 662 of the Conservation Law where acquisition is pursuant to chapter sixteen of the laws of nineteen hundred and twenty-six.[3]

Had these appellees, distrusting the Commission's observance of its flag of truce, (Exhibit 2, Affidavit of

[1]Appellants' Appendix, p. 23.
[2]Idem, p. 48.
[3]Idem, p. 27.

White, R., 75-76), commenced a suit before October 11, 1928 they would have been met by the rule that courts will not pass upon the validity of a law upon the mere suggestion that it is void and that possible action may be had under it and in advance of any proceedings had or threatened by the officials who, if the law were valid, would be called upon as authorized to act.

People of N. Y. v. *Canal Board of N. Y. et al.*, 55 N. Y. 390, 397.

Prior to its meeting the acts of the Commission in obtaining approvals pursuant to Chapter 16 of the laws of 1926 if known would have indicated an intention to proceed lawfully by condemnation.

Before the service of the notice of appropriation, by virtue of which if effective title passes to the state and which was the first knowledge appellees had of the move against them, the suit would have been premature. Afterward appellants say it is too late the suit is in effect ejectment.

There was therefore no time before this suit, according to appellants' theory, when the Commission either by concealment or celerity could not have defeated a suit in equity.

Equity will not allow appellants to hold a possession so obtained. When a state officer slides for a base in this fashion the officer may land on the base but he cannot hold it in the name of the state. The bill of complaint rests upon an absence of lawful power to enforce a statute and an abuse of authority and its merits must be determined accordingly; it is concededly not a suit against the state.

Goltra v. *Weeks*, 271 U. S. 536, 545.
Philadelphia Co. v. *Stimson*, 223 U. S. 605, 621.

Appellants contend (Brief, p. 66) that the relief asked under the guise of an equity bill and prayer for injunction is nothing more or less than the relief a judgment in ejectment would give and that the equity jurisdiction of the Federal courts does not extend to such a case.

It is established by the decisions of the Court of Appeals of New York which follow that a peculiar jurisdiction exists in equity to prevent illegal acts of public officers under color of right which injuriously affect the property rights of individuals.

Assignment of error 4 (R., 99) read:

> "4. The Court erred in not dismissing the bill of complaint on the ground that the suit is in reality against the State of New York and with respect to property in its possession, and that the State has not given its consent to be sued."

Appellants have withdrawn this assignment of error, (Brief, p. 17). It is the only assignment of error which raises the question of possession. Errors 28 and 30 (R., 103) raise only the question of title, in other words the effectiveness of the notice of appropriation. The appeal consequently raises no question of the Eleventh Amendment and *the suit is no longer possessory but entirely concerned with the effect of a notice* served on appellees as the individual act of the Commissioners and without effect by reason of its illegality.

Since the peculiar jurisdiction of equity under the law of the locality to restrain public officers is thoroughly established by the decisions of the highest court of the locality, the case becomes one for the application of the rule in this Court that

> "A party, by going into a national court, does not, this Court has said, lose any right or appropriate remedy of which he might have availed himself in the State courts of the same locality; the wise policy of the constitution gives him a choice of tribunals."
>
> *Smith* v. *Reeves,* 178 U. S. 436, 444.

In a similar case which went to Court of Appeals it was written:

> "In the case at bar the complaint and the proofs establish a cause of action against individuals who have mistakenly and unlawfully assumed to act under color of law, so that in its simplist analysis the ultimate question is, whether the plaintiff could maintain this form of action against the defendants if they had professed to enter his premises simply as individuals. As that question can have but one answer we conclude that the judgment of the courts below must be reversed and a new trial had, with costs to abide the event."
>
> *Litchfield* v. *Bond,* 186 N. Y. 66, 85.

There plaintiff sued to restrain the state engineer and his assistants from entering, or doing acts on his premises, in effectuating an act of the legislature relating to the establishment of county lines.

The defendants had there as here already entered upon plaintiff's land and had cut a slash through his woodlands.

Flood v. *Van Wormser,* 147 N. Y. 284, 289.

There defendant as commissioner of highways was enjoined from removing plaintiff's house as encroaching upon the highway.

The Court of Appeals said:

> "In *People* v. *Canal Board* (55 N. Y. 390), it was held that while a court of equity has no supervisory power or jurisdiction over public officials, or public bodies, it will exercise its peculiar jurisdiction over them to prevent some illegal act, under color or claim of right, affecting injuriously the property rights of individuals. It is under one of the heads of equity jurisdiction that the court interferes to prevent injury to land, if the trespass will be attended by irreparable mischief and plaintiff may be unable to obtain relief at law."
>
> *The West Point Iron Co.* v. *Reymert,* 45 N. Y. 703.

There the rule was established in New York that plaintiff's title being already established as in the present suit an action at law for that purpose is unnecessary and equity will grant injunctive relief to prevent an injury which is not a mere fugitive trespass.

Baron v. *Korn,* 127 N. Y. 224, 228.

This was an action to restrain the maintenance of a wall, compel its removal and for damages.

The Court of Appeals said:

> "Assuming plaintiff's title to be established, the authority of the court in a suit in equity to interfere and prevent an appropriation of their lands to the use of another for building purposes cannot be longer questioned, not only for the purpose of avoiding multiplicity of actions, but also because they were without adequate remedy at law."
>
> *Bloomquist* v. *Farson,* 222 N. Y. 375.

This recent decision of the highest court establishes that in New York adequacy of legal remedy is an affirmative defense which must be pleaded and cannot be raised

upon a motion to dismiss the complaint. No answer is in the record and we assume appellants will concede that in the answer filed after the submission below the only plea of this nature is an allegation that appellees may obtain a judgment in the Court of Claims.

The same jurisdiction to restrain public officers acting under color of right is recognized in the federal courts.

Osborn v. *U. S. Bank*, 9 Wheat 738.

There this Court recognized the necessity of jurisdiction to restrain a public officer having plaintiff's property in his possession unlawfully from acts which would result in its passing beyond the power of such officer to restore.

The Court said of tax money unlawfully collected and in the possession of defendant:

> "In the regular course of things the agent would pay over the money immediately to his principal, and would thus place it beyond the reach of the injured party since his principal is not amenable to the law." (p. 844).

In the present case the property and the plant are taken in the name of the People of the State for a public park. It is stated in the affidavit of White (R., 59) that the lands acquired by his Commission "have been converted into great public parks which now serve the recreational needs of millions of persons annually".

The statements of appellees that their property had a very great earning power is confirmed by the allegation in the affidavit of White (R., 58) that quarries along the Hudson taken by purchase or condemnation "were earning large profits."

The monopoly of the New York Trap Rock Company in the New York market is not denied nor is the quotation from its president's letter of December 15, 1926 showing the phenomenal increase in use of crushed stone and the great value of appellees' property disputed (R., 37).

Concededly appellees were about to commence operations. They find themselves deprived of their property "daily suffering great loss from the continued unlawful occupation of their property, deterioration of buildings and machinery and impossibility of operation" (Bill, par. Twentieth, R., 8). The Commission "may at any time enter upon the destruction and demolition of the plant" (R., 44) which it took one year to erect at a cost of one million dollars (R., 40) and which it would take as much time and probably more money to replace. Meanwhile appellee Standard Trap Rock Corporation has earned no return on its capital and paid no dividends (R., 44). If the property is destroyed it is not at all likely new capital will be forthcoming to replace the plant so that success without injunctive relief will not stay execution of the death warrant.

The land taken for a park will meanwhile be overrun by some of the millions whose "recreational needs" (R., 59) will be satisfied only when every last vestige of moveable property has disappeared from the lands made accessible to them by automobile credit associations and individual suits against whom, if possible, would fill the courts fuller than the Eighteenth Amendment.

Under such circumstances the federal courts grant mandatory injunctions restoring possession.

> *Pokegama S. P. Lumber Co.* v. *Klamath River Lumber & Imp. Co.*, 86 Fed. 528; on final hearing 96 Fed. 34.

There at the outset possession was restored to a lessee by a temporary restraining order in a suit against the lessor.

The Court says:

> "It is contended that the injunction although preventative in form was mandatory in effect, its execution resulting in a change in the status of the parties. The contention assumes that the Court will recognize the respondent as asserting at the

> time the bill was filed a claim of possession to the property under color of right to such possession and that the effect of the order was to oust it from that possession. But equity will not permit a mere form to conceal the real position and substantial rights of parties. Equity always attempts to get at the substance of things and to ascertain, uphold and enforce rights and duties which spring from the real relations of parties. It will never suffer the mere appearance and external form to conceal the true purposes, objects and consequences of a transaction. Pom. Eq. Jur. 2d Ed. §98" (p. 533).

Answering the contention also made here that the action should be at law the Court proceeds:

> "If defendant's possession is but an interruption of the prior possession of complainant whose right is clear and certain an injunction may be granted without compelling complainant to establish his title by an action at law. The interference in such cases rests as in cases of nuisance upon a clear and certain right to the enjoyment of the subject in question and an injurious interruption of that right which upon just and equitable grounds ought to be prevented. High, Inf. §356 (p. 537).
>
> *Slaughter* v. *Mallet Land & Cattle Co.*, 141 Fed. 282, 288.

Bill in equity to prevent trespass and to remove cloud. On demurrer a plea to the jurisdiction by reason of adequate remedy at law overruled and order affirmed on appeal.

The Court says:

> "The attempts of Slaughter, no matter how successful, to take forcible possession of the land cannot be recognized as giving him actual and lawful possession nor be made the foundation of any right between him and complainant from proceeding with a bill to remove cloud with preventive re-

lief against the attempted destruction of title and possession".

Love v. *Atchison T. & S. F. Ry. Co.*, 185 Fed. 321, 333.

This case recognizes equitable jurisdiction in suits against public officers in the words of SANBORN, Circuit Judge:

> "Moreover in truth the purpose and effect of these injunctions were to restore and maintain the status which existed before the unconstitutional acts of the people and the officers of Oklahoma disturbed that status and thereby to prevent the irreparable injury which the companies must otherwise have suffered during the pendency of these suits. Plenary power is conferred and the undoubted duty is imposed upon a court of equity to issue its injunction for that purpose."

Percy Summer Club v. *Astle*, 145 Fed. 53.

There the citizens and residents of New Hampshire claimed a public right to enter upon a lake to fish just as in the present case it is claimed the appellees' property has become a public park. An injunction was denied upon a finding of such public right but equitable jurisdiction was first sustained to prevent such entry if unlawful.

The Court said:

> "Under these circumstances, having in view especially the intervention of the state of New Hampshire in this litigation, it is evident that although the respondents might ordinarily be regarded as mere trespassers, yet here they may be said to represent a class; that class being all the residents of New Hampshire who may desire to fish in ponds or lakes of the character of that in dispute here. Therefore the case is sufficiently analogous to a bill of peace to justify the intervention of a court of equity, if other things are sufficient therefor, because it is very plain that ac-

> tions at law would not give the complainant adequate relief."

The Circuit Court of Appeals affirmed the order after an exhaustive review of fishing rights in the state but upon the subject of equity jurisidiction wrote (163 Fed. 1):

> "At the argument the defendants contended that the bill should be dismissed because the complainant had an adequate remedy at law. We do not find this objection stated anywhere in the pleadings and we agree with the learned judge of the court below that the case was not without the jurisdiction of the Circuit Court by reason of a want of equity."

Finally in many varieties of action it is established in this Court that violation of the federal constitution by state officers may be enjoined.

> *West. Un. Tel. Co.* v. *Andrews,* 216 U. S. 165.
> *Big Six Development Co.* v. *Mitchell,* 138 Fed. 279.

> "We think, both upon reason and authority, that in a case such as this, where the injury is to the use (that is to say, where irreparable mischief is being done or threatened, going to the very substance of the estate) a court of equity has jurisdiction, not only for the purpose of restraining waste or threatened trespass, but, having acquired jurisdiction for that purpose, it may also proceed to settle the question of title and to remove the cloud; and this was the view taken by the Circuit Court."

This opinion is cited with approval in *Twist* v. *Prairie Oil Co.,* 274 U. S. 684, 691.

> *United States Freehold Land & Emigration Co.* v. *Gallegas,* 89 Fed. 769, 773.

SANBORN, Circuit Judge, wrote:

> "A continuing trespass upon real estate, or upon an interest therein, to the serious damage of the complainant, warrants an injunction to restrain it. A suit in equity is generally the only adequate remedy for trespasses continually repeated because constantly recurring actions would be more vexatious and expensive than effective."

The cases cited by appellants lack two elements here present, irreparable injury and the unlawful act of a state agency. Those upon the jurisdiction of a federal court in ejectment would have been germane had these appellees brought such an action.

We are accused (Appellants' Brief, p. 70) of having proceeded in the federal court because of two decisions in the appellate courts of New York.

In *Pauchogue Land Corp.* v. *Long Island State Park Commissions,* 278 U. S. 657 this Court denied certiorari in January 1929 while the present suit was commenced March 19, 1929 (R., 3). Appellees certainly did not enter the federal court to avoid that decision.

In *Flagg* v. *Moses,* 132 Misc. 494; 225 App. Div. 887, the opinion of the Special Term was delivered after a trial of the action to restrain the defendant from the use of the lands in question as a public park and for damages. The record shows and the opinion relies upon the fact that testimony of real estate brokers familiar with values in the locality was produced by the defendants and sustained the estimate of value upon which the sum of money available to pay compensation was based. The Court says (p. 496):

> "If the opinion of these men is to govern, the sum available was reasonably adequate. In fact more than sufficient to pay for the land taken."

In the present case the value alleged and supported by appellees' affidavits is not met either with a denial or conflicting proof by affidavit.

Moreover in the *Flagg* case, after considering the question of value, the Court proceeded (p. 497):

> "The foregoing is sufficient to defeat the plaintiffs' cause of action, but still another element prevents them from recovery.
>
> The plaintiffs, in order to save themselves from being barred in the Court of Claims by the two years Statute of Limitations, shortly before such statute would apply, filed their suit in the Court of Claims, asking that court to fix the value of the property taken, and to direct the State Treasurer to pay it to them.
>
> The weight of authority upholds the defendant's contention that the submission by plaintiff to the Court of Claims is a bar to a recovery here. The cases in support of this contention hang upon the decision in Great Falls Mfg. Co. *v.* Attorney General (124 U. S. 581). Under this and other decisions the proceeding in the Court of Claims constitutes plaintiffs' only remedy".

Appellees instituted this suit in the District Court of the United States rather than in the state courts because they were advised such was their right and that it was "a sufficient foundation for jurisdiction that the title or right set up by the party may be defeated by one construction of the constitution or law of the United States and sustained by the opposite construction."

Osborn v. *U. S. Bank*, 9 Wheat 738.

POINT VII.

The interlocutory decree is proper and grants proper relief.

The affidavit of White (R., 57) states:

> "Though the questions involved are almost wholly questions of law, certain facts as to the *background* of this litigation should be presented to the Court."

None of this background is disputed. It is the same background described by the appellees and in turn denies none of their allegations.

The case resolved itself entirely into a question of law.

Under Section 266 of the Judicial Code:

> "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court."

Under the practice in the Southern District the same three judges would sit at the final hearing.

Having reached the conclusion shown in their opinion it would have been a denial of justice to have restricted the decree to a preservation of conditions existing after the unlawful appropriation.

The argument below took place on April 6th, 1929 (R., 1). Printed briefs and reply briefs were filed and the Court had the matter under consideration two months after which its opinion was filed June 7, 1929 (R., 97).

Under the opinion nothing remained to be determined on a final hearing and the exact value of appellees' property had become immaterial in view of the Court's conclusion that no funds had been appropriated for a taking in the manner chosen by the Commission.

Instead of going through the idle ceremony of a trial both appellants and appellees joined in a motion to advance and the argument in this Court has been delayed only by illness of counsel with the appellants.

Exactly the same situation exists which would have been presented had appellees at once brought the case on for trial with the result already determined in their favor and an appeal had then been taken to this Court.

The present case is exactly within the rule quoted by appellants from *Cavanaugh* v. *Looney*, 248 U. S. 453, 456

since the case is free from doubt and the injunction necessary to prevent great and irreparable injury.

On the contrary the present case is not one where defendants intend to institute condemnation proceedings in a State Court, as in the *Cavanaugh* case, in which the objections to the validity of Chapter 75, Part V, of the laws of 1928 assuming to reappropriate might, after the expiration of eighteen months, terminate the proceeding. Here there will be no proceeding in any State Court.

Under all these circumstances the decree was proper in form because properly in substance a final decree rendered by the trial Court after it had determined all the issues.

Conclusion.

In conclusion appellants argue that if the state's so-called promise to pay is insufficient in administrative eminent domain the state can "never employ the entry and appropriation process."

Section 50 of the Conservation Law[1] shows the legislature does not intend the department shall exercise the power except "when moneys have been appropriated therefor."

Worse things might happen than that commissions' wings should be so trimmed and the provisions of all comparable statutes show an intention on the part of the legislature to obey the state constitution[2] and curb the activities of the state agencies which may think they have power to subject the state to obligation beyond legislature appropriation.

---

[1]Appellants' Appendix, p. 22.

[2]For example especially §662 of the Conservation Law providing appropriation of bond moneys approved by popular referendum shall not be affected thereby (Appellants' Appendix, p. 27).

It is stated by appellants that "there is notoriously a wide discrepancy between the owner's estimate of the value of property in eminent domain and the estimate of the State's officials" (Appellants' Brief, p. 81).

Nevertheless the Condemnation Law, Section 24, quoted at page 24, supra, makes the amount a condemnor, including the state, must deposit if possession is taken before payment, the value put upon the property by the owner.

For twenty eight years this Commission got on very nicely without any such power and according to the affidavit of White (R., 59) preserved the scenic beauty of the Palisades and acquired lands for a public park large enough to serve millions of persons annually. Only two million is over five thousand a day and all this was done under a statute which makes payment a condition of possession (L. 1900, Ch. 170).

What great emergency exists to necessitate a power to take on credit when the Commission has been so successful on a cash basis? Certainly it cannot truthfully be said that it was necessary to the proper performance by this Commission of its functions after twenty eight years of successful operation under a statute which protects both public purse and land owner.

The decision of the statutory court upheld here will not end the practice of eminent domain by appropriation and entry as appellants cry (Brief, p. 80). It merely holds this Commission within the bounds prescribed uniformly by the courts of the state and United States.

Appellants' brief concludes with the statement that entry and appropriation had its origin in the Erie Canal Act of 1817 and that the decision of the Court below, were it to stand, would mean the end of the practice.

It is therefore interesting and important to find the Erie Canal Act, chapter 262 of the Laws of 1817, providing in section 3 for appraisal by commissioners of damages and then containing the words:

> "And the Canal Commissioners shall pay the damages so to be assessed and appraised and the fee simple of the premises, so appropriated, shall be vested in the people of this State."

Chancellor Kent in *Rogers* v. *Bradshaw*, 20 Johns 735, 741 said:—

> "Under the act of 1817, it was, also, provided, that where lands were taken, as being necessary for the prosecution of the improvements, the fee should vest in the state on being paid for."

The practice of entry and appropriation in its origin therefore required payment before vesting of title.

The interlocutory decree should therefore be in all respects affirmed.

Respectfully submitted,

JACKSON A. DYKMAN,
Counsel for Appellees.

WILLIAM N. DYKMAN,
on the Brief.